Supreme Court, U. S.
FILED
OCT 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 75-651, 75-715, and 75-718
(Consolidated)

No. 75-651
TEAMSTERS LOCAL UNION 657, *Petitioner,*
v.
JESSE RODRIGUEZ, ET AL., *Respondents.*

No. 75-715
SOUTHERN CONFERENCE OF TEAMSTERS, *Petitioner,*
v.
JESSE RODRIGUEZ, ET AL., *Respondents.*

No. 75-718
EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner,*
v.
JESSE RODRIGUEZ, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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14914-10-76

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TEAMSTERS LOCAL UNION 657,

vs. Petitioner,

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SOUTHERN CONFERENCE OF TEAMSTERS,

vs. Petitioner,

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No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,

vs. Petitioner,

JESSE RODRIGUEZ, et al., Respondents.

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Where the parties tried this case as a Title VII class action and the record contains evidence meeting the requirements of Rule 23, did the district court err in dismissing the class action?

2. Did respondents' evidence, including statistical proof of segregated hiring and other exclusionary patterns-and-practices, make out a prima facie case of class-wide discrimination in initial hiring and assignment under appropriate standards?

3. Are petitioners' restrictive no-transfer rules and dual seniority system, which prevent minority employees from obtaining the road driver positions which they seek, unlawful under Title VII and 42 U.S.C. §1981?

4. Are the union petitioners liable for having violated Title VII and 42 U.S.C. §1981 by participating in collective bargaining agreements which contain terms that perpetuate past discrimination and "lock in"

minority city drivers?

5. Did the district court err in dismissing the respondents' individual discrimination claims based on its own evaluation of qualifications even though petitioner company had never considered those qualifications?

COUNTER-STATEMENT OF FACTS

A. Introduction to the Case.

Because of omissions and inaccuracies in the Statement of Facts in petitioners' briefs, respondents find it necessary to make this Counter-Statement of Facts.

This is a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., brought by a group of Mexican American workers (respondents here, plaintiffs below) against their employer, East Texas Motor Freight (ETMF), an interstate trucking company, and their union representatives, the Southern Conference of Teamsters and Teamsters Local 657 (petitioners). This action was filed December 26, 1971 in the Western District of Texas.[1/] This

1/ On June 29, 1972, the United States

suit grew out of written charges filed by the plaintiffs with the Equal Employment Opportunity Commission, complaining that the policies of ETMF, the Southern Conference of Teamsters and Teamsters Local 657 discriminated against Mexican Americans and Blacks by relegating them to the less lucrative city driver jobs and excluding them from road driver jobs. Plaintiffs received "right to sue" letters in October 1971 and shortly thereafter filed this class action suit.

The plaintiffs complained about petitioners' discriminatory policies which discourage and prevent transfer from city to road jobs, regardless of qualification. The policies, briefly stated, are ETMF's no-transfer rules, which bar inter-terminal

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also filed suit against the ETMF system and the International Brotherhood of Teamsters in the Northern District of Texas, alleging that the defendants were engaged in a pattern and practice of discrimination in employment in violation of Title VII and Executive Order 11246, 3 C.F.R. 339 (1965), N.D. Tex. Civ. No. 3-6025-B. The government's suit resulted in a partial consent decree between the United States and ETMF (App. 424-443). The Fifth Circuit correctly held that this consent decree, which did not cover many members of the class in the instant action, did not bar these proceedings

transfers and require that city drivers resign their city jobs before applying for road jobs, and the rule (sanctioned and required by the separate agreements negotiated by the Southern Conference of Teamsters and ETMF for city and road jobs) preventing city drivers from carrying their seniority to road driver jobs.

B. The Facts.

The road and city driver workforces at ETMF's Texas terminals reflect a pattern of pervasive discrimination. Mexican Americans and Blacks have been totally excluded from road positions. The assertion of the Southern Conference that "...the makeup of city employees at terminals across the state of Texas generally reflected the racial-national origin makeup of the respective communities in which the terminals were located" (Southern Conf. Br. 8) is not supported by the record cite or the facts. ETMF employs in-city

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(505 F.2d at 65-66, App. 108-111). The government's case proceeded to trial against the union defendants. After trial, the district court found that ETMF and the Teamsters had discriminated against Black and Mexican American city drivers, and granted relief against the unions, 10 EPD ¶10,345 (N.D. Tex. 1975).

drivers at 20 of its 21 terminals within the state of Texas but inter-city road drivers are domiciled at only 6 of these terminals (ETMF Br. 6).[2/] The employment statistics for the two jobs show a segregated pattern of racial/ethnic staffing. Overall, as of March 1972, ETMF employed 544 city drivers in Texas; of these, 102 (19%) were Spanish-surnamed, 95 (17%) Black, and 347 (64%) were Anglo (App. 315-16). But of approximately 183 road drivers, all but 3 (1.6%) were Anglo, and none was Black (App. 315).

The three Mexican American road drivers were all hired after plaintiff Rodriguez had filed his EEOC charge in 1971 (App. 113-4).[3/] Prior to that filing, ETMF stipulated the company had never employed a Mexican American or Black road driver in the Southern Conference in Texas (App. 56). In the Southern Conference area, including several other states in addition to Texas, ETMF employed 415 road drivers as of May 1971—all Anglos

2/ The terminals with road drivers are Dallas, El Paso, Longview, San Angelo, and Texarkana (Pl. Ex. 21, App. 352 ff.).

3/ Significantly, although domiciled at El Paso, they did not drive in Texas; they were assigned to runs west of El Paso in the

(App. 322).[4/]

The individual terminal statistics are revealing. The racial/ethnic composition of the drivers at various terminals with both city and road drivers as of February 1972 is shown in tabular form:

Terminal	City Drivers			Road Drivers		
	SSA	B	W	SSA	B	W
Dallas[5/]	11	5	107	0	0	59
El Paso	22	1	0	3	0	52[6/]
Longview	0	1	27	0	0	32
San Angelo	0	1	18	0	0	32
Texarkana	0	0	9	0	0	5

Source: Pl. Ex. 21 (App. 352-415)[7/]

Western Conference area (App. 239, 306-07).

4/ ETMF stipulated in the government's pattern-and-practice suit that as late as June 1972 the company had no Black road drivers anywhere (App. 445) and employed only 8 Mexican American road drivers among its approximately 800 total road drivers (id). Of these 8, ETMF had hired only 3 (those employed in 1971 in El Paso); it "acquired" the other 5 in a merger (id.).

5/ City driver figures for Dallas, which are not shown on Pl. Ex. 21 as reprinted in the Appendix, are reported as of July 1971 from Pl. Ex. 1 (App. 322).

6/ Includes two Native Americans.

7/ The other terminal at which road drivers

At the Fort Worth terminal (no road drivers domiciled) all 35 city drivers were Anglo (App. 379-80), whereas at Houston of 157 city drivers 110 were minorities—37 Spanish-surnamed and 73 Black (App. 385-91). At San Antonio (one road driver domiciled at one time) 41 of 47 city drivers were minorities—32 Spanish-surnamed and 9 Blacks (App. 408-10). Thus, the only ETMF terminals throughout Texas where more than a token few minority persons held city driver jobs were in San Antonio, El Paso and Houston, where nearly all or the great majority of city drivers were minorities, and Dallas, where about 13% were. All three minority road drivers drove west from El Paso; the road driver contingent throughout the rest of the state remained lily-white to the time of trial.

In summary, the terminal-by-terminal, statewide, and Southern Conference employment figures make it crystal-clear that race was a constant and pervasive factor in staffing ETMF's truck driver jobs. In many ter-

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were domiciled, Pecos, had no city drivers; its 16 road drivers were all white (App. 404).

minals, Mexican Americans and Blacks were simply not hired as drivers; in several others, they were considered for city driver jobs along with whites, but not for road positions. In El Paso, virtually all city drivers were Mexican Americans, but road driver jobs were reserved for Anglos.[8/]

C. Facts Showing Discrimination, Regardless of Definition Applied.

Whether discrimination is given its old-fashioned definition of different treatment of different groups of people based on proscribed factors or, consistent with this Court's definition in Griggs v. Duke Power Co., 401 U.S. 424 (1971), its newer definition of similar treatment having a disparate effect, the record shows discrimination in this case.

1. Griggs-type discrimination: similar treatment of different groups.

ETMF and the unions have maintained road driver positions in a separate status from local terminal jobs, including city driver. Road jobs are covered by separate

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8/ The same pattern of segregated hiring formerly prevailed at Houston, where most city drivers are Mexican American or Black. Houston was a road driver domicile until 1965 (App. 310).

collective bargaining agreements between the petitioners, and consequently seniority accrued in city or local jobs is not usable or transferable to road positions (App. 175-76). To compound the effects of the separate seniority units, ETMF prohibits transfer from city to road driver positions (App. 227-28). ETMF modified this policy for a one-month period in 1972, but only to give transfer rights to city drivers at road driver domicile terminals—almost all of whom are Anglos (App. 228-29). In addition, ETMF's no-transfer policy precludes transfers between different terminals, regardless of what job or jobs are involved (App. 187-88, 310).[9/] As a result, persons initially hired as city drivers are effectively precluded from later becoming road drivers—unless they are willing to resign their city employment, forfeit their accrued seniority, and start over (if hired) as a new road driver at the bottom of the seniority list. ETMF's vice president for industrial relations readily agreed that this system "did have the effect of locking

9/ ETMF has deviated from this rule at least in allowing inter-terminal bumping, by road drivers only, during periods of layoffs, under the "modified seniority system" (App. 343, 346, 230).

in all city drivers into city positions" (App. 231). Indeed, ETMF acknowledges that this lock-in effect was the main purpose of the no-transfer rule (Br. 6-7). Since the seniority/transfer system effectively screens out city drivers from road positions, it operates as an employee selection standard. The adverse impact of this standard falls most heavily on Mexican Americans and Blacks.

2. Old-fashioned discrimination: different treatment of different groups of people based on proscribed differences.

However, whether one uses the Griggs definition of discrimination or not, clearly there is plain old-fashioned discrimination here.

Contrary to the allegations of ETMF that it applies equally its "facially neutral" driving standards, ETMF has often treated its minority and Anglo employees differently by not requiring all Anglo drivers to meet those standards. In the government's suit, the Court found as a fact that: "ETMF did not strictly comply with stated company hiring standards through the years when hiring drivers for over-the-road jobs. Deviations may be found from every standard regarding age,

education, safety record, and driving experience." 10 EPD ¶10,345 at p. 5416.[10] The instant record contains similar evidence, see App. 181.

ETMF claims that each terminal operates as a separate hiring center (Br. at 6, 33). While this may be the case as to many city employees, it is emphatically not true of hiring for road drivers. Corporate headquarters in Dallas are deeply involved in hiring road drivers for the entire ETMF system, and maintain "very tight corporate control" of such hiring (App. 181).

The hiring process is commenced when a transportation officer—presumably upon advice or request from a terminal—makes known to the safety department in Dallas a need to hire additional road drivers (App. 227). Safety supervisors reporting to the director of safety review applications, pass on applicants' qualifications, and even ride in the cab while giving applicants road tests (App. 301-02, 312-13). Local terminal managers can

10/ The record in United States v. ETMF reveals dozens of instances in which ETMF hired road drivers who did not meet the age, weight, education or experience requirements allegedly "required" by the company (see p. 62, ¶ iv, infra).

refer or recommend applicants, but the hiring decision and process remain centralized[11] (App. 226-227). When city drivers seek transfer to road jobs, terminal personnel cannot pass on their requests, but refer them to Dallas; alternatively, the transfer request could be made directly to the central office (App. 141, 312-13). Thus, the officials who have charge of processing road driver applications and deciding whether and where to place road drivers are the same central office personnel who also have complete knowledge as to where vacancies exist in the ETMF system.

In addition to referrals from local terminals where applications for road positions may be filed, the Dallas headquarters also receives referrals from outside sources. The company has "traditionally" relied on Teamster unions as a source of job applicants (App. 315.)[12] A high company of-

11/ Both the director of safety and the vice president for industrial relations emphasized that local terminals managers' authority to hire road drivers is far more circumscribed than their power to hire city drivers or other local personnel (App. 227, 302).

12/ In the Consent Decree negotiated in the United States v. ETMF proceeding, the

ficial also testified that ETMF relied heavily on referrals by incumbent employees as a source of applicants (App. 186).[13] He also stated that ETMF would not take applications except when it had vacancies (App. 187), thereby increasing the importance of inside information for persons referred to the company.

D. The Individual Claims.

All named plaintiffs, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera, were initially employed as city drivers in the San Antonio terminal at least six years prior to this suit (App. 124, 134-5, 270). Each orally inquired about road driver positions and the possibility of transfer to road jobs on many occasions (App. 119-20, 239-40, 244, 290-1). They expressed willingness to transfer, even if they had to lose their seniority

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practice of the unions' referring of applicants to ETMF was sanctioned: "When ETMF needs additional employees, it shall give the applicable local union equal oportunity along with other sources to provide suitable applicants if it has a referral hall, but ETMF shall not be required to hire those referred by the local union unless mandated by applicable union contract. App. 429-30 [emphasis added].

13/ At road driver domicile terminals, these incumbents are heavily Anglo.

and move to another city (App. 268-9, 275, 284, 299; Tr. 64, 66, 67). Other class members including Trinidad Gomez, Lupe Morales and Andrew Hernandez also expressed similar interests to union and company officials as well (App. 130-3, 159, 265-6, 314). Finally, in late 1970, all named plaintiffs and Trinidad Gomez made written application for transfer to road jobs (App. 324-7). However, plaintiffs' applications were not submitted to the Dallas office until after charges had been filed by plaintiffs with the EEOC (App. 56-7).

Plaintiffs got little, if any, response from union officials or company representatives regarding either the oral or written applications. In fact, plaintiffs were even met with derogatory comments about Mexican Americans.

Thus, Dick Truitt, ETMF's Terminal Agent, told Mr. Perez that road jobs were not for Mexican Americans; that the equipment was too expensive for Mexican Americans to be driving it (App. 240, 241). Mr. Truitt concluded with the remark, "...we try. We treat you people nice here." (App. 241) The response of Ray Shafer, the union represen-

tative, was equally blunt. Mr. Perez had learned from Wes Sager, ETMF's Terminal Manager, that there were road openings in San Angelo and sought Sager's assistance in securing one of those jobs (App. 252). Shafer's response was to call Everett Cloer, ETMF's Vice President in charge of industrial relations (App. 71, 225), and Sager's superior and tell Cloer to tell Wes Sager to quit giving out "this type of information" (App. 252-53). The response to Mr. Rodriguez' application came from Mr. Beierle, the Assistant Terminal Manager for ETMF, and Mr. Shafer. Mr. Bierle told him that ETMF had a policy of prohibiting city drivers to transfer to road positions (App. 270-71). Shafer also mentioned the no-transfer policy, adding that he could not tell the companies whom to hire (App. 274). Mr. Rodriguez, however, was less than persuaded since he had read in the company magazine about a white city driver working for ETMF who had transferred to a road driver's job (App. 277-78).

Mr. Herrera got similar responses from Ed Asbury, ETMF's Terminal Manager, who told Herrera that he did not qualify (App. 290-91) and later that the no-transfer policy

precluded such a move.

The response to the written applications for road positions was even more worrisome: they were filed, and only much later forwarded to the main office in Dallas for consideration on the merits (App. 418).

Although the district court found defendants' actions toward plaintiffs was justified because they allegedly failed to meet the job qualifications (App. 60), the facts show that other Anglos were hired subsequent to the date of plaintiffs' applications who similarly failed to qualify for road jobs, based on a literal reading of those qualifications (App. 181). However, as an ETMF official testified, plaintiffs' applications and qualifications were not even considered, even after they were finally submitted to the Dallas office, because the no-transfer policy would have precluded their consideration for those jobs (App. 190-1). Thus the company never passed on plaintiffs' qualifications.

E. Decisions of the Courts Below.

A non-jury trial was held on January 29 and 30, 1973, and on March 22, 1974 Judge Wood filed his findings of fact and conclu-

sions of law (App. 56-57); judgment for defendants (App. 67) was entered on the same day. The district judge found that the cause of action was inappropriate for class action treatment and that none of the defendants had violated either Title VII or §1981 in any respect. The district judge's findings and remarks during the course of trial show that he equated the determination of illegality with a finding of blatant racial discrimination appearing on the face of defendants' actions, as opposed to an unjustified discriminatory effect of facially neutral practices.[14/]

14/ Thus, the district court relied on the mere existence of facially neutral facts to support its no-discrimination result: e.g.,the facts that the union contract provisions prohibiting transfer applied "to all job applicants and employees regardless of race or qualifications"(Finding of Fact No. 11 [App. 59]);that a good portion of those hired as city drivers were Mexican American and Black (Finding of Fact No. 14 [App. 59]); and that the local union is comprised of a majority of Mexican American and Black members (Finding of Fact No. 17 [App. 59]). Consistent with this orientation, in his questioning of the witnesses Judge Wood kept trying to find "prejudice". He asked one of the plaintiffs' Chicano witnesses whether, "[i]n the course of any of these conversations with...the people in charge, the em-

Respondents filed a timely notice of appeal on May 3, 1973. On November 24, 1974, the Court of Appeals for the Fifth Circuit, speaking through Judge Wisdom, rendered its decision reversing the judgment of the district court. The Court of Appeals held:

(i) The district court erred in dismissing the class action (505 F.2d at 49-52;

ployees, your co-workers or with the union itself, was any of this motivated by prejudice against you or any of the other men or employees because of their race, because they were Mexican Americans or Black?" (App.133)

Also, in questioning ETMF's President, H.L. Johnson, Judge Wood asked if Anglos are "treated just exactly like the Mexican Americans" in that they, too, would lose seniority if they transfer from city to road (App. 174-5). Again, in a colloquy with counsel the Judge pointed out and stressed that the no-transfer policy "is done irrespective of race or national origin..."and "that's the thing that's troubling the Court" (App.198). See also App. 199-200.

As these illustrations show, the trial court ignored the correct legal standard for defining discrimination. Discrimination is not only different treatment of different groups of people, based on proscribed differences, but also like treatment having a discriminatory effect and not required by "business necessity". Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

App. 76-83).[15/]

(ii) The district court erred in failing to find that plaintiffs had made out an unrebutted prima facie case of discrimination (505 F.2d at 53-59).[16/]

15/ In so holding, the Fifth Circuit expressly rejected the district court's assertion that plaintiffs had presented "no proof" of class-wide discrimination; the appellate court noted the "overpowering" statistical evidence and proof of the separate seniority and no-transfer policies. The Fifth Circuit also noted that the pretrial stipulation, that "the only issue presently before the Court...is whether the failure of the defendant, East Texas Motor Freight, to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. §1981", was entered in an attempt to eliminate confusion in exposition of evidence at trial, not to foreclose the class issues, and that this was made clear at trial to defendants and the trial court.

16/ In reaching this holding, the Fifth Circuit recognized both the great weight to be given to such strong statistical evidence as appears here, and the familiar lock-out pattern characterizing ETMF's seniority and transfer policies. It found that such policies "although neutral on their face, tend to preserve or continue the effects of past discriminatory [hiring] practices" which had restricted minority dirvers to city positions. For this reason, the appellate court correctly refused to give plaintiffs' stipulation that the named plaintiffs were not discriminated against when they were hired

(iii) Although the union defendants had no responsibility for hiring, nevertheless both Local 657 and the Southern Conference of Teamsters had violated Title VII and §1981 by participating in the establishment and maintenance of the separate seniority unit system under the collective bargaining agreements (505 F.2d at 60-61; App. 97-101).[17/]

(iv) For its remedy, the Court of Appeals directed the district court to grant class members who could qualify under legitimate qualification standards an opportunity to transfer to road driver jobs with carryover seniority sufficient to restore them to their "rightful place" positions. It also directed the trial court to consider back pay awards under proper standards (505 F.2d at 61-64; App. 101-08).

(v) The Court of Appeals held the district court's finding, that all three named

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as city drivers at the San Antonio terminal (App. 417) the broad reading that defendants urged.

17/ The Fifth Circuit reasoned that the unions were parties to the collective bargaining agreements despite their awareness of the lock-out effect of the seniority system established therein.

plaintiffs were unqualified, to be "premature", since ETMF admittedly never considered plaintiffs' applications on their merits. The Fifth Circuit remanded the issue for determination under correct standards (505 F.2d at 63; App. 104).

Petitions for certiorari to review this judgment were filed by all defendants. This Court granted them on May 24, 1976.

SUMMARY OF ARGUMENT

I. The district court erred in dismissing the class action. ETMF's contention that it had no notice that plaintiffs were pursuing the class action is inconsistent with the plaintiffs' clear statements to the contrary and with ETMF's own trial defense, which concentrated on the class allegations. Dismissal for failure to pursue the class action was therefore error. Nor does the failure to move to certify the class action justify dismissal, since no party was prejudiced thereby. Plaintiffs' evidence satisfied all the requirements of Rule 23(a) and (b)(2), Fed. R. Civ. P., for maintaining this case as a class action of the type that Congress and the courts have endorsed. The class action defined by the

Fifth Circuit is appropriate, and may be refined by use of appropriate orders in conduct of the class action on remand.

II. Standards of prima facie proof for Title VII class actions like this one are different from those announced in McDonnell-Douglas Corp v. Green, 411 U.S. 792 (1973), for individual claims. Statistical patterns and systemic evidence of discrimination are highly probative and shift the burden of explanation to defendants, even in the absence of detailed proof as to individual class members. The record contains extensive evidence of systemic discrimination practices in addition to glaring statistical disparities in the hiring of whites and minorities for both city driver and road driver positions across Texas. The reasons ETMF advances to explain the exclusion of minorities from road driver jobs are unpersuasive. The Court should hold that plaintiffs proved a prima facie case of class-wide discrimination.

III. ETMF's no-transfer rules lock out virtually all its Mexican American and Black employees, who are city drivers, from road driver positions. No "business necessity" requires these rules. They are therefore

unlawful, both as restrictions which perpetuate the effects of past hiring discrimination and as selection standards which fall under the rule of Griggs v. Duke Power Co., 401 U.S. 424 (1971). Defendants' dual seniority system also perpetuates the exclusion of minority drivers from road positions. This discriminatory seniority system is not a bona fide seniority system within the meaning of §703(h) of Title VII. None of the factors the union defendants rely on to argue that system's bona fides detracts from the conclusion that it is unlawful.

IV. Both union defendants refused to help their minority city driver members obtain their rightful opportunity to seek and gain road driver jobs. Both unions must therefore share in liability for the discriminatory effects of the dual seniority system and other restrictive practices. Unions have an affirmative obligation to seek equal employment opportunities for all workers. The unions' actions and omissions in this case fall short of that standard. None of reasons advanced by the unions - the separate obligations imposed by the National Labor Relations Act, the purported preferences of

union members, and other factors - justifies the unions' practices or excuses them from liability.

V. Although it is clear that ETMF never considered the Mexican American plaintiffs' qualifications for road jobs, at trial, over plaintiffs' strenuous objections, the district court erred in permitting ETMF to defend the case on the basis that plaintiffs were poorly qualified, and in dismissing the individual claims based on its own evaluation of the qualifications. The Fifth Circuit correctly reversed the district court's dismissal of the individual claims, in keeping with the correct legal standards. Assuming arguendo that the district court could properly have reviewed plaintiffs' qualifications as road drivers, the district court committed error by applying ETMF's paper standards. Those alleged standards were purely theoretical, for ETMF did not adhere to them in hiring Anglo road drivers. An employer may not require minority applicants to meet higher or different qualifications from those required of similarly situated whites. The district court committed clear error in adopting ETMF's unequally applied paper standards as guidelines for its decision.

ARGUMENT

I. THIS CASE IS MAINTAINABLE AS A CLASS ACTION, AS THE COURT OF APPEALS HELD. THE DISTRICT COURT ERRED IN DISMISSING THE CLASS ACTION.

A. Introduction.

The positions argued in ETMF's brief on the merits[18/] differ substantially from those framed as Questions Presented, on which certiorari was granted. The thrust of ETMF's petition was that the Fifth Circuit's class action ruling had deprived petitioners of a chance to argue the question of class certification (ETMF Pet. 10-22). In its brief, ETMF repeats that contention (Br. 13-16), but also argues that the Fifth Circuit's ruling prejudiced its defense on the merits of the class action (ETMF Br. 18-29) and that the case was not a proper class action (ETMF Br. 29-36).[19/] Although ETMF earlier argued that

18/ The union petitioners have deferred to ETMF's discussion of class action issues, but adopt ETMF's position. See Southern Conference Petition p. 11 n. 10 and Br. 2 n.2.

19/ ETMF also extensively argues another issue related only to the merits of the class claim—the standard of proof issue (see argument II, infra), ETMF Br. 37-55.

the Court of Appeals should not have decided the merits of the class action, it now seeks to have this Court decide those merits in its favor. Respondents are therefore compelled to reply both to the due process question initially presented and to the Rule 23 issue as to the propriety of this case as a class action.

B. Class Action Proceedings Below.

Plaintiffs filed this suit as a class action (App. 7-8); defendants denied this allegation (App. 20, 25, 28-32). At the time of trial, no party had moved for a certification of the class pursuant to Rule 23(c)(1), Fed. R. Civ. P. Defendants rely on a pre-trial stipulation (App. 115 ¶8) to argue that plaintiffs had abandoned the class action, but on its face the stipulation does not support that claim.[20/] In the pre-trial order

20/ The stipulation was limited to defining issues "pertaining to the company" (App. 115). The determination of the issue specified for trial—"whether the [ETMF] failure...to consider plaintiff's [sic] line driver applications constituted a violation of Title VII and 42 U.S.C. §1981 (id.)—would necessarily require determination of the class-wide issues as to the no-transfer rule and lock-in seniority system.

filed and entered on the day trial started (App. 4) plaintiffs unambiguously showed that they were pursuing their class action: their outline of the case includes several pages of contentions and prayers for relief that can only be construed as directed to the class on a pattern-and-practice theory.[21/] Moreover, the pre-trial order recites explicitly at p. 3:

> By way of relief, plaintiffs have requested that this Court allow the instant proceeding to proceed as a class action on behalf of those Mexican American and black city drivers and applicants within that part of the State of Texas covered by the Southern Conference collective bargaining agreement...Plaintiffs request that they and members of their class be awarded all back pay lost due to the discriminatory conditions engaged in by defendants.

Early in the trial, in colloquy quoted by the Fifth Circuit (505 F.2d at 52 n. 14; App. 82-83 n. 14), plaintiffs' counsel reiterated their intention to proceed with the class action. In reply the District Judge

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21/ See plaintiffs' proposed pre-trial order (not reproduced in appendix), pp.3-6.

stated that he would "leave that open"(App. 130). After trial in which the parties introduced extensive evidence pertinent to the class action issue, see p.31, infra, the district court dismissed the class action without reviewing the evidence showing that plaintiffs had fulfilled the requirements of Rule 23 (App. 66). The district court simply asserted that plaintiffs had offered "no credible proof" going to the existence of a class or of "liability or damages as to any class" (App. 65), and dismissed the class action as "not a proper one" (App. 66). This was respondents' first notice that the court was prepared to make its final class determination at that time.

The Fifth Circuit approached the class action question on appeal with the express understanding that Rule 23 standards applied and that plaintiffs had the burden of satisfying them (505 F.2d at 50; App. 78).[22/] The Fifth Circuit reversed the district court's sudden dismissal of the class action and expressly rejected the reasons given by the

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22/ ETMF's rhetorical assertion that the Court of Appeals "exempted the plaintiffs from the requirements of Rule 23" (Br. 29) is unsubstantiated.

lower court and petitioners for the dismissal (505 F.2d at 50-51; App. 79-81). In addition—and, we submit separately from an analytical standpoint[23/]—the Fifth Circuit reviewed the evidence and determined that Rule 23 requirements had been met (505 F.2d at 51-52; App. 81-83). It also defined the proper scope of the class (id.).

C. Petitioners Had Adequate Opportunity To Present Their Evidence on the Merits of the Class Action Claims and Did So.

ETMF's petition for certiorari opined that petitioners had no chance to defend against the class claims. It appeared to seek merely a chance to present evidence. Its brief on the merits no longer stresses this argument. Instead, it contends that the evidence does permit review of the class determination issues, that the class action is not maintainable, and that no discrimination was shown.

ETMF's due process argument is based on the premise that it had no fair opportunity to defeat the class action. This premise is faulty. Petitioners had repeated notice at

23/ Cf. Jimenez v. Weinberger, 523 F.2d 689, 699 n. 22 (7th Cir. 1975) (Stevens, J.).

and before trial that plaintiffs intended to seek class representative status, see p.28, supra. In fact, all parties tried this case as a class action.[24/] Defendants' witnesses gave lengthy testimony about the history and structure of collective bargaining in the Southern Conference and nationwide,[25/] the provisions of collective bargaining agreements past and present across the country,[26/] ETMF's application and hiring procedures,[27/] the origin and purported business necessity for the no-transfer rules on a company-wide basis,[28/] the justification for purported terminal-based hiring responsibility on a company-wide basis,[29/] the history of ETMF's

24/ ETMF's contention that it concentrated on the named plaintiffs' qualifications is not borne out by the record of trial. See nn. 25-31, infra, and accompanying text. The testimony cited in those footnotes is only a part of what the original record contains.

25/ See, e.g., App. 143, 205-12, 214, 230-1, 308.

26/ See, e.g., App. 145-8, 152-6, 215-9, 220-4, 231.

27/ See, e.g., App. 140-1, 171-2, 176-81, 186-7, 225-7, 233-4, 301-2, 312-3.

28/ See, e.g., App. 162-8, 172-6, 188-9, 227-9, 232, 202-6.

29/ See, e.g., App. 186-7, 180.

acquisitions,[30] and attempted explanations for ETMF's racial/ethnic employment statistics.[31]

The class action issue was presented and the district court decided it. In light of what actually happened at trial, it would be inconsistent with the parties' and the court's conduct of the case to give the disputed stipulation the strained reading urged by ETMF. The Fifth Circuit properly refused to do so.[32] The stipulation concerning issues for trial is most logically read as indicating at most that the parties would reserve the class action issue for later determination, while introducing pertinent evidence as it arose in the course of the trial of individual claims. This Court must therefore reject the suggestion (ETMF Br. 25, 37) that the class action was not properly before the

30/ See, e.g., App. 161-2, 168-9, 310.

31/ See, e.g., App. 149, 181-6.

32/ The Fifth Circuit correctly concluded that, "The stipulation was apparently entered into in an attempt to eliminate some confusion in the exposition of evidence at trial, not to foreclose the class issues. The plaintiffs continued to proceed as in a class action, and this was made clear to the trial court and the defendants."(505 F.2d at 52; App.82)

district court.[33]

D. The District Court Erred in Dismissing the Class Action.

The District Court's order does not specify on precisely what grounds it concluded that the case was not a "proper one" for class action treatment. But none of the reasons discussed by the court below justified its dismissal of the class action.

Plaintiffs' failure to file a formal motion for certification of the class action pursuant to Rule 23(c)(1), Fed. R. Civ. P., was not sufficient reason to dismiss this class action. As the Fifth Circuit observed, while Rule 23(c)(1) contemplates that plaintiffs should timely file such a motion, it imposes the obligation to make the determination on the court (505 F.2d at 49-50; App. 77-78). Accord: EEOC v. Detroit Edison Co., 515 F.2d 301, 310 (6th Cir. 1975), cert. filed, 44 LW 3214 (Sep. 12, 1975); Advisory Committee Note to Rule 23(c)(1), 39 F.R.D. 69,

33/ Even if the Court should decide that the case was not fully tried as a class action, the case should be remanded for hearing on the class action. Even on this assumption, the district court's dismissal was erroneous.

104 (1966). In a relatively small number of districts, the federal courts have by local rule required plaintiffs to raise the issue by motion within a specified period, see ETMF Br. 24 n. 7.[34/] No district in Texas is among them. In fulfilling its obligation to determine the class action's status, a district court may, in appropriate circumstances, reach its class determination at the same time it decides the merits of a Rule 23 (b)(2) class claim, notwithstanding the direction of Rule 23(c)(1) that a determination be made "[a]s soon as practicable". Jimenez v. Weinberger, 523 F.2d 689, 697, 699 (7th Cir. 1975) (per Stevens, J.); EEOC v. Detroit Edison Co., supra, 515 F.2d at 310-11. The propriety of such a determination turns not on a wooden application of some rule of timeliness, but rather on whether it would unfairly prejudice defendants. Jimenez v. Weinberger, supra, 523 F.2d at 698-9; Senter v. General Motors Corp., 532 F.2d 511, 521-2 (6th Cir. 1976); cf. Bing v. Roadway Express,

34/ In United States v. Terminal Transport Co., 11 EPD ¶10,704 (N.D. Ga. 1976) at p.6937, the court certified a class action despite failure of plaintiffs to file a timely Rule 23(c)(1) motion as required by local rule, because of the court's "independent obligation to determine the class."

Inc., 485 F.2d 441 (5th Cir. 1973) [Bing II].

In the instant case, as in Senter and Bing II, the parties proceeded with the understanding that plaintiffs had not relinquished their class claims, despite their failure to move for certification. The defendants fully presented their evidence against the class action and the class claims on the merits. Although ETMF repeatedly protested that plaintiffs' failure to move for certification deprived it of the opportunity to defend, it nowhere suggests what further evidence it would introduce; and in fact ETMF did put on a comprehensive defense on the initial issue of prima facie proof of discrimination against the class. Moreover, ETMF was content not to precipitate the class action question by filing an appropriate motion in the trial court. The company's due-process argument claiming prejudice is undermined by the self-inflicted nature of its "injury".

A local rule of court (or even a rule announced in litigation) requiring plaintiffs to seek class certification might well be consistent with Rule 23(c)(1).[35/] But its retro-

35/ However, a flexible standard allowing districts discretion to adopt rules dictated

active application to plaintiffs in this case—four years after trial—would be unfair.[36] The whole purpose of procedural rules is to inform parties of how much they must or may proceed to press their claims. In the absence of any such rule, plaintiffs could properly assume that the court—not the parties—retained the responsibility given it by Rule 23(c)(1). Plaintiffs violated no rule, and should not be penalized because of the court's oversight or desire to delay ruling on the class action until it ruled on the merits.

The trial judge was also apparently troubled, in light of Rule 23(a)(4) (App. 66), by the post-trial vote of union members (most of whom were not members of the plaintiff class) against merger of road and city seniority rosters.[37] App. 44-54; see 505 F.2d at

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by their own needs and experiences may better fulfill the purpose of Rule 23.

36/ Cf. Linkletter v. Walker, 381 U.S. 618, 622-8 (1965); James v. United States, 366 U.S. 213, 221 (1961).

37/ Most class members are not Local 657 members and therefore could not vote; likewise, many persons at the meeting were not ETMF employees. See 505 F.2d at 51; App. 80.

50-51; App. 79-81. Such carefully staged post-trial "deliberations" under a defendant's control are of course suspect, and both the somewhat incoherent discussions and the votes taken at the Local 657 meeting are inapposite to the questions before the Fifth Circuit and this Court.[38] Only Local 657 still argues that this meeting is a significant factor in the case; the other petitioners do not rely on it.

Since neither of the reasons stated by the district court will support its dismissal of the class action, we turn to petitioners' arguments and the record to review the action's compliance with Rule 23 requirements.

E. The Fifth Circuit Correctly Held That This Case Is Maintainable As a Class Action.

The Fifth Circuit analyzed plaintiffs'

38/ The proposals voted down are not consistent with the limited transfer relief plaintiffs now seek as ordered by the Fifth Circuit, see p. 18, supra. The first proposal, as cleverly framed by the President of Local 657 (App. 46), was for a single unit for system-wide seniority throughout the Southern Conference for all truck lines (App. 51). The second proposal would have granted transfer rights with carry-over seniority to all employees on all lines in the Southern Conference (App. 52-53). Both proposals would have

compliance with Rule 23 in light of two underlying principles: that the Rule should be applied "liberally" to Title VII suits, and that Title VII cases are inherently class actions (505 F.2d at 50; App. 78). These observations reflect the uniform view of the Courts of Appeals[39/] as well as a major Con-

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adversely affected the seniority standing of many Local 657 members; plaintiffs' proper remedy would not.

39/ "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class...And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class." Hall v. Werthan Bag Co., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). The Fifth Circuit, adopting this reasoning and noting that the Title VII plaintiff is in effect a private attorney general who vindicates public policy on behalf of others of his or her class, established a broad policy favoring class action treatment of Title VII claims in Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), and Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). At least five other circuits have adopted the same position: see, e.g., Barnett v. W.T. Grant Co., 518 F. 2d 543 (4th Cir. 1975); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Reed v. Arlington Hotel, Inc.,

gressional policy embodied in Title VII. As this Court recognized in Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971), Congress meant to allow and encourage class treatment of employment discrimination claims. Congress explicitly approved private class action proceedings under Title VII when it amended the Act in 1972.[40/] Congress also

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476 F.2d 721 (8th Cir. 1973); and Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975). No Circuit Court has rejected this general approach.

40/ The House passed a bill that would have severely restricted or eliminated private class actions. The Senate rejected any such restrictions. The Committee Report on Section 706(d) of the Senate Bill (dealing with EEOC Commissioners' charges) stated:

> This section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that Title VII actions are by their very nature class complaints, 16/ and that any restriction on such actions would greatly undermine the effectiveness of Title VII.

S. Rep. 415 at 27, 92d Cong., 1st Sess.(1971) (emphasis added). Footnote 16 cited several leading class action decisions, including Oatis v. Crown Zellerbach Corp., supra n. 39, and Jenkins v. United Gas Corp., supra n. 39.

The Conference Committee adopted the

recognized in 1972 that the important Title VII policy of ensuring complete relief to victims of discrimination, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-21 (1975),

Senate's position on class actions. The section-by-section analysis of §706(f)(1) of Conferees' final bill states:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim by named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House Bill and specifically

required broad treatment of related claims.[41] Complementing the judicial and Congressional approval of Title VII class actions is the

> rejected by the Conference Committee.

118 Cong. Rec. 7168, 7565 (1972) (emphasis supplied). Both Chambers passed the Bill approved in Conference Committee, 118 Cong. Rec. 7170, 7573 (1972).

41/ The Conference Committee's section-by-section analysis of Title VII's remedial provision, §706(g), 42 U.S.C. §2000e-5(g), states:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 Cong. Rec. 4942 (1972) (emphasis added).

intent of the drafters of amended Rule 23. They designed Rule 23, and particularly subsection (b)(2), specifically to accommodate appropriate civil rights cases. See Advisory Committee Note to Rule 23(b)(2), 39 F.R.D. 69, 102 (1966).

The record supports the Fifth Circuit's conclusion that "[t]here is no serious dispute that the named plaintiffs have satisfied the first three criteria in Rule 23(a)," as well as those of Rule 23(b)(2)[42/] (505 F.2d at 50; App. 79). The numerosity requirement of Rule 23(a)(1) is easily met by the showing that ETMF employed approximately 200 minority city drivers in Texas (App. 315). The commonality requirement of Rule 23(a)(2) is satisfied by the large number of common issues related to ETMF's discriminatory hiring policies, the no-transfer rules and their justifications, and the dual seniority system and its effects, mechanisms, and justifications. The typicality requirement of Rule

42/ Defendants do not contest the applicability of Rule 23(b)(2) if the standards of Rule 23(a) are met. Defendants' actions were on grounds generally applicable to the class—race or national origin—and plaintiffs sought appropriate class-wide relief.

23(a)(3) is met because the plaintiffs, like class members, were subjected to a policy limiting minority truck drivers to city jobs and were locked in to those jobs by the no-transfer rules and dual seniority system. Petitioners' defenses included extensive efforts to explain and justify both ETMF's general hiring policies, and the restrictive seniority and transfer policies.[43/]

ETMF argues that this action as defined by the Fifth Circuit fails to meet the conditions of Rule 23(a)(3) and (4) (Br. 33-36). Its argument as to Rule 23(a)(3) is based on the premise that all hiring responsibilities remain at local terminals. This assumption is inaccurate insofar as road driver hiring is concerned (see pp.12-13, supra). Moreover, the absence of minority road drivers at all terminals confirms a uniform policy or pattern of racial exclusion. The premise is also inconsistent with the strong evidence of racially-defined patterns in city driver hiring (see pp.7-9, supra). There are, therefore, substantial common questions concerning the employment of Mexican American and Black truck drivers at the allegedly independent terminals.

43/ See pp.31-32, supra.

This satisfies Rule 23(a)(3); typicality does not mean that the claims of named plaintiffs must be in every respect identical to those of all class members. Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir.1975); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2nd Cir. 1968).

ETMF also contends that plaintiffs fail to meet the Rul 23(a)(4) requirement of adequate representation. Its contention hinges on the alleged distinctions between road and city-only terminals. From these it implies that named plaintiffs and other employees at city terminals may have weaker claims on the merits than the few class members at road domicile terminals. Even accepting those assertions, which are by no means clear, ETMF has not demonstrated the requisite antagonism of interests which would be fatal to plaintiffs' class representation. 44/

44/ It is well settled that a plaintiff may lose his individual claim and still represent the class. Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. en banc 1973); cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-8 (1974). ETMF's suggestion that the efficacy of class representation will be affected by the relative merits of plaintiffs' claims to relief, compared to those of the class, is purely speculative. Individual entitlements

The arguments advanced by ETMF would at most justify narrowing the scope of the class action or providing for appropriate orders in conduct of the action, cf. Rule 23(d)(2). They cannot support the district court's judgment dismissing the class claims entirely. The district court erred in ignoring the obvious possibilities for properly dealing with the scope-of-class questions raised by ETMF, as suggested by the Court of Appeals. The district court could and should have utilized sub-classes pursuant to Rule 23(c)(4); framed the relief to fit differing circumstances and locations; and if necessary narrowed the class. 505 F.2d at 51, 62-63, 65; App. 81, 103-4, 109; cf. Franks v. Bowman Transportation Co., 47 L.Ed.2d 444, 470-1 (1976).

The Southern Conference urges that the scope of the class determined by the Fifth Circuit is inappropriate; it argues that at most a terminal-wide class is proper (Br.24). It relies in part on the existence of the government's ETMF pattern-and-practice action. That reliance is misplaced, since private

can be neither subordinated to nor advanced by determination of the class members' claims.

Title VII litigants cannot be barred from seeking relief by a decree not granting the relief in a government action to which they were not parties, Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-4 (2nd Cir. 1972), cert. denied 411 U.S. 931 (1973).[45/] The Fifth Circuit recognized this (505 F.2d at 66; App. 109-10). Contrary to the Teamsters' implication, multi-terminal class actions are a commonplace in Title VII trucking industry cases. See, e.g., Sagers v. Yellow Freight System, Inc., 58 F.R.D. 54 (N.D. Ga. 1972), 388 F. Supp. 507, 511 (N.D. Ga. 1973), aff'd, 529 F.2d 721 (5th Cir. 1976) (Southern Conference-wide class action held proper).[46/]

45/ The partial consent decree in the government's action provides no relief for most minority city drivers at city-only terminals (see App. 431-2). It is an open question not here presented whether, in a government pattern-and-practice action, class members have a right to object to a settlement as they would under Rule 23(e), Fed. R. Civ. P., cf. United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 875-8 (5th Cir. 1975), cert. denied 48 L.Ed.2d 187 (1976). No such objection procedures were utilized in United States v. East Texas Motor Freight, supra.

46/ See also: Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100 (N.D. Ga. 1976) (Southern Conference); United States v.

In suits centering on road-driver positions, multi-terminal class actions are particularly appropriate for several reasons: the regional and national structure of collective bargaining, the resulting uniformity of road driver contracts, and the geographically extended situs of a road driver's work.

The Fifth Circuit's disposition of the cases leaves to the district court's informed exercise of remedial discretion all appropriate options for proper handling of the class action. Under its instructions for remand, many or even most members of the class may not qualify for relief, see 505 F.2d at 62-63, 64-65, App. 102-4, 107-8. But the district court could not properly refuse to consider their claims for relief and dismiss them out of hand. This outright dismissal was the court's basic error, and the fact that it was erroneous was the appellate court's basic holding. That holding was correct and should be affirmed.

T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), cert. granted 44 LW 3669 (May 24, 1976) (nationwide); United States v. Lee Way Motor Freight, 7 EPD ¶9066 (W.D. Okla. 1973) (nationwide); United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975)(nationwide); Franks v. Bowman Transportation Co.,

II. PLAINTIFFS PROVED A PRIMA FACIE CASE OF DISCRIMINATION IN HIRING AND ASSIGNMENT OF TRUCK DRIVERS THROUGHOUT ETMF'S TEXAS SYSTEM.

A. Standards of Proof Different From Those Announced in McDonnell-Douglas Corp. v. Green Are Applicable to This Class Action Challenging Systemic Discrimination Practices.

In directly confronting the broad question of what standards should govern the prima facie proof of Title VII class actions, the Court faces issues which are novel at this level[47/] and of critical importance to the efficacy of Title VII. The Court's decision in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), scrupulously left the issues open. There the Court noted at the

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supra (company-wide); United States v. Trucking Employers, Inc., 12 EPD ¶11,162 (D. D.C. 1975) (nationwide, multi-employer defendant class action).

47/ The Court is, of course, no stranger to Title VII class actions, having dealt with them on the merits in Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); and Franks v. Bowman Transportation Co., 47 L.Ed.2d 444 (1976). But this case presents important issues not previously joined before the Court.

outset that "the critical issue before us concerns the order and allocation of proof in a private non-class action challenging employment discrimination," 411 U.S. at 800 (emphasis supplied). After formulating its four-part outline for prima facie proof in such an individual case, the Court further noted that,

> The facts will vary in Title VII cases and the specification of the prima facie proof required from respondent [the plaintiff] is not necessarily applicable in every respect to differing factual situations.

411 U.S. at 802. The Court also took pains to note that class-type proof might also be relevant to the discrimination issue in an individual claim context, and stated that statistical evidence would be probative of an employer's "general [minority] employment policy." See, 411 U.S. at 804-5.[48/]

48/ "Other evidence that may be relevant to any showing of pretext includes facts as to petitioners' general policy and practice with respect to minority employment.18 On the latter point, statistics as to petitioner's employment policy and practice may be helpful...

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[18]The district court may, for example, determine...that

Prima facie proof of class-wide discrimination must be measured against different standards than those announced in McDonnell-Douglas. In the context of a substantial class action, a case under those standards would be wholly unmanageable. To require individual proof of application, qualification, and vacancy would reduce Rule 23 in Title VII class actions to little more than a permissive joinder device.[49/] This would contradict the express purpose of the 1966 amendments to Rule 23. The Advisory Committee which drafted the amendments sought to

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> the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . . [S]uch general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision . . ."

[emphasis supplied]

49/ It would also appear contrary to this Court's decision in Franks v. Bowman Transportation Co., 47 L.Ed.2d 444, 466 (1976).

streamline and rationalize class action procedures, see Note of Advisory Committe on the Rules, 39 F.R.D. 69, 98-99 (1966); Wright & Miller, Federal Practice and Procedure--Civil (1972) §1752, p. 525; §1753, pp. 538 ff. The drafters recognized in particular that subdivision 23(b)(2) would provide the appropriate procedural framework for adjudicating claims of discrimination based on policies or practices generally applicable to groups of persons on a racial basis; 39 F.R.D. at 102. The primary inquiry in that framework is to the existence of the overall practices and their classwide implications--not into the individual circumstances of persons within the class, id.

ETMF purports to concede that proper Title VII class action trial procedure includes bifurcated proceedings with individual proof of application, qualification, and vacancy (as appropriate) reserved for the second-stage proceedings (ETMF Br. at 51-55).[50/] Yet it artfully renders the con-

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50/ See Baxter v. Savannah Sugar Refining

cession nugatory by insisting that, as part of the prima facie class case, plaintiffs must adduce specific "proof of injury" to class members (id. 52).[51/] Such a requirement, if applied literally, would minimize the usefulness of class action proceedings as a means of presenting group claims, contrary to the purpose of the 1966 amendments. Burdensome proof requirements are simply inappropriate at the first, prima facie proof stage of Title VII actions.[52/]

Common sense and experience dictate a second and more basic reason to apply standards different from the test for individual claims, in a broad class action. The exis-

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Corp., 495 F.2d 437, 443 (5th Cir. 1974), cert. denied, 419 U.S. 1033 (1974); United States (Ford) v. United States Steel Corp., 520 F.2d 1043, 1053-4 (5th Cir. 1975); cert. denied __U.S.__ (October 4, 1976).

51/ The degree of specificity urged by ETMF, as reflected in cases it quotes and its own reformulation of the doctrine, is great. See ETMF Br. at 53-55.

52/ This issue is squarely presented and extensively argued to this Court in the United States v. T.I.M.E.-D.C. case, Nos. 75-636, 75-762.

tence of class-type employment patterns (such as a statistical absence of minority road drivers, or a racially-determined job assignment pattern throughout Texas) fundamentally alters the problems of proof and evidence inherent in individual claims. A considerable degree of legitimate uncertainty may surround determination of the actual reason for non-employment of a particular worker in a particular job.[53/] But when many individual workers of a minority class fail to obtain employment in many different job slots in a number of locations, the reason lies not in examination of the specific facts of each application but in a general practice of discouraging or rejecting such applications.[54/]

53/ See, for example, the Court's discussion of the individual claims in McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 803-6.

54/ The instant case amply illustrates our point. The exclusion of all minorities from all 180-odd road driver positions in the State of Texas over a period of many years--coupled with transfer and seniority policies which here and everywhere else have the effect of perpetuating that exclusion--is more than a simple summary of numerous individual decisions to hire Anglo drivers. It is simply inconceivable, in this case, that all 180 employment decisions could have been made without reference to racial considerations.

Application of McDonnell-Douglas standards to such a case would ignore the most pertinent and probative evidence.[55/]

Title VII class actions are different from individual claims: at one more complex and more susceptible of prima facie determination based on objective, unambiguous evidence. Standards for proof must reflect this difference.

B. Prima Facie Proof By Statistics And By Patterns and Practices of Discrimination Shifts The Burden Of Explanation To Defendants.

ETMF misrepresents the record as containing no evidence of class-wide discrimination except a "general imbalance" in its road driver work force. (Br. 37, 41-42).[56/] Although it seeks to characterize plaintiffs'

55/ At least two courts have articulated the link between statistical probability and proof of discrimination. United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 992 (W.D. N.Y. 1970), aff'd in pert. part, 446 F.2d 652 (2nd Cir. 1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127 n. 7 (8th Cir. 1969).

56/ Similarly, in its petition for certiorari the Southern Conference misleadingly summarizes the evidence as showing "the mere existence of a statistical imbalance in racial

case as founded on mere statistics, in fact plaintiffs proved the presence of discrimination policies by extensive non-statistical evidence. That proof includes: the local, state-wide, and national patterns of segregated job assignments in ETMF (pp. 6-8, supra); the familiar lock-in rules preventing transfer and seniority carry-over (pp. 9-11, supra); failure to utilize centralized road driver hiring practices to match minority applicants with available vacancies (pp. 12-13, supra); failure to follow purported hiring standards for Anglo road drivers (pp. 11-12, supra); extension of special transfer rights to city drivers on a basis that excluded most minorities (p. 10 and n.9, supra); and the harsh reception of plaintiffs' applications for road driver positions (pp. 14-17, supra). Defendants' understatement of the case notwithstanding, the record shows that their employment practices and their effects bear all the hallmarks of the typical nationwide pattern of discrimination prevailing in

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composition of employees in a particular job classification" (Pet. 3, Question 1).

in the trucking industry. Road driver jobs are for white men only.[57/]

Even if this were a case in which plaintiffs relied on statistics alone, the dramatic evidence of racial hiring throughout ETMF's system would suffice to make out a prima facie case of class discrimination practices. This Court has emphasized the significance of statistical proof of racial exclusion; see, e.g., Turner v. Fouche, 396 U.S. 346, 360 (1970). As the Fifth Circuit pithily stated, "[i]n the problem of racial discrimination, statistics often tell much, and courts listen", Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff'd, 371 U.S. 37 (1962). At least six circuits--the Fourth;[58/]

57/ See, e.g., cases and studies cited by the Fifth Circuit, 505 F.2d at 53-54 and nn. 16, 17, App. 85-87 and nn. 16, 17. Many more cases could be cited.

58/ Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972), cert. denied, 409 U.S. 982 (1972) (statistics especially valuable "because proof of discrimination is seldom direct"); Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975) ("statistics can in appropriate cases establish a prima facie case of discrimination without the necessity of showing specific instances of overt discrimination").

Fifth,[59/] Sixth,[60/] Eighth,[61/] Ninth,[62/] and Tenth,[63/]--have expressly recognized the great weight carried by statistical evidence in Title VII class action cases. This Court has noted that statistics may be probative

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59/ Bing v. Roadway Express, Inc., 444 F.2d 687, 689 (5th Cir. 1971); United States v. Hayes Int'l. Corp., 456 F.2d 112, 120 (5th Cir. 1972) (statistical evidence alone may present a prima facie case of discrimination").

60/ Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir. 1976); Afro-American Patrolmen's League v. Duck, 503 F.2d 294, 299 (6th Cir. 1974).

61/ Parham v. Southwestern Bell Tel & Tel Co., 433 F.2d 421 (8th Cir. 1970) (statistical proof established a violation of Title VII); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127 n.7 (8th Cir. 1969); Reed v. Arlington Hotel, Inc., 476 F.2d 721, 723 (8th Cir. 1973).

62/ United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); Kaplan v. Int'l Ass'n of Theatrical and Stage Employees, 525 F.2d 1354, 1358 (9th Cir. 1975).

63/ Jones v. Lee Way Motor Freight, 431 F.2d 245, 247 (10th Cir. 1971), cert. denied 401 U.S. 954 (1971); Muller v. United States Steel Corp., 509 F.2d 923, 926 (10th Cir. 1975); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 271 (10th Cir. 1975) ("racial statistics are an entirely appropriate method of proving prima facie discrimination").

even in single-claim cases, McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 805. Statistical evidence of exclusion is reinforced by evidence showing how the systematically exclusionary practices operate. Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972), cert. denied, 409 U.S. 982 (1972). The combination of statistical and systemic evidence proves both the results and the mechanism of employment discrimination.

The Courts of Appeals regularly hold in Title VII cases that clear statistical patterns of racial exclusion justify "shifting the burden of proof" to defendants, requiring them to explain why--if not for discrimination--so few minorities hold particular jobs. The Fifth Circuit's holding in United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972) is representative of such decisions:

> The inference [of racial discrimination] arises from the statistics themselves and no other evidence is required to support the inference. At this stage of the proceedings it was not necessary for the [plaintiff] Attorney General to show the availability of skilled Negroes in the community perform the jobs in question because the burden of going forward and showing the lack of qualified Negroes was upon Hayes. . . .

When policies or practices commonly associated with racial discrimination complement strong statistical evidence, the inference is all the more compelling. The nature of class actions and class-wide proof, see pp. 50-54, supra, justifies and even requires drawing inferences and shifting burdens of proof in such cases.[64/] It is both logical and fair to demand that employers come forward to explain a statistical pattern of exclusion. This is particularly the case in Title VII situations where the defendants ordinarily have far greater access to employ-

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64/ This is particularly true in discrimination cases, since as many courts have noted, the perpetrators of discrimination almost never admit their design. Brown v. Gaston County Dyeing Machine Co., supra, 457 F.2d at 1382, Marquez v. Omaha Sales Division, Ford Motor Co., 440 F.2d 1157, 1162 (8th Cir. 1971); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975), vac'd and rem'd on other grounds, 46 L.Ed. 2d 29 (1975).

ment records and other evidence than do plaintiffs.

The courts' reliance on statistical evidence as a basis for inferring discrimination practices is founded in their extensive experience with what they invariably find beneath the surface picture painted by statistics.[65/] The ETMF situation is illustrative. In the case at bar, discovery and proof was restricted by the limited resources of the private plaintiffs for investigation and documentation of specific incidents or local situations. Even so, they built an impressive case showing comprehensive discrimination practices of many types, see pp. 55-6, supra. When the United States Justice Department, with its vast resources,[65a/] investigated the facts underlying ETMF's statistics, it found vivid proof of overt racism. Based on this proof, Judge Hughes in the Northern District of Texas found, "[t]he

65/ Thus, the Fifth Circuit, which has long experience with the racial reality underlying "the inexorable zero", United States v. T.I.M.E-D.C., Inc., supra, 517 F.2d at 315, has aptly observed that, ". . . Nothing is as emphatic as zero . . .", United States v. Hinds County Bd. of Ed., 417 F.2d 852, 858 (5th Cir. 1969).

65a/ Including the Federal Bureau of Investigation, which was used extensively in the ETMF matter.

evidence showed that discrimination occurred against Blacks and Spanish-surnamed Americans who applied for or attempted to transfer to over-the-road jobs," and that ETMF did not comply with its own hiring standards, United States v. East Texas Motor Freight System, Inc., 10 EPD ¶10,345 (N.D. Tex. 1975) at p. 5416. Among the evidence before the court was the following:

> (i) Until at least 1963 the ETMF application form required applicants to state race and national origin.[66/]
>
> (ii) ETMF's former personnel director testified, "The Company, so far as road drivers was concerned, did not want to employ minorities as road drivers" until at least 1967. [67/]
>
> (iii) A proferred 1966 memorandum from a terminal manager to the personnel director discussing what to do "if and when we must hire colored boys". [68/]

66/ Portions of record in United States v. East Texas Motor Freight System, Inc., lodged by Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.,pp. 234, 236, 244, 245, 282-288.

67/ Id., p. 38.

68/ Id., p. 276.

(iv) Application forms and other documents and summaries thereof listing dozens of individual white road drivers who failed to meet ETMF's purported hiring standards, such as driving experience and safe driving records. 69/

(v) A 1966 memorandum from the personnel director outlining ways to frustrate EEO compliance procedures designed to increase minority hiring: for example, by refusing to notify the NAACP or National Urban League of vacancies, although "expected" to do so, "until or unless greater pressure is exerted". The same memorandum recommends that ETMF "[r]etain our flexible criteria for job selection at all levels". 70/

(vi) The personnel director testified that ETMF instituted the no-transfer rule in order to prevent Black city drivers in St. Louis from transferring to the road. 71/

69/ Id., pp. 149-219, 227-232, 268-274.

70/ Id. pp. 278-280.

71/ Id. p. 47.

Although the foregoing evidence is not of record in the instant case, it shows what, here as in other cases, lies behind the "mere statistics" that petitioners would have the Court discount completely. 72/

Decisions recognizing the weight of statistical and other pattern-and-practice evidence and holding that it shifts the burden of proof are correct for another, practical reason. Private litigants, on whom Congress primarily relied to enforce Title VII's prohibitions, 73/ cannot conduct investigations at the prima facie proof stage like those that unearthed the government's massive evidence in United States v. East Texas Motor Freight System, Inc., supra, and United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), cert. granted May 24, 1976 (Nos. 75-636,-672); and see n.72, supra.

72/ Compare, e.g., Jones v. Lee Way Motor Freight, supra, n.63 (private action decided on basis of statistical evidence), with United States v. Lee Way Motor Freight, 7 EPD ¶9066 (W.D. Okla., 1973) (government action decided with massive and detailed findings as to individuals, confirming statistical proof in Jones).

73/ Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 716 (5th Cir. 1974).

Statistical evidence has broad patterns of discrimination are within the capability of diligent private litigants to prove at the initial stage. A rule that allows a finding of prima facie proof to be based on appropriate evidence of this type and shifts the burden of explanation to defendants is critical to the viability of class actions brought by "private attorneys general", see cases cited in n.73, supra.

C. Plaintiffs Proved A Prima Facie Case Of Hiring Discrimination Against The Class Of Minority City Drivers.

Plaintiffs succeeded in proving a prima facie case of class-wide hiring discrimination under the standards discussed in the preceding section, or under any proper standards. We have previously set out the statistical and systemic evidence in this record, see pp. 6-8 , supra, which we submit is sufficient to shift the burden of proof to defendants. Petitioners seek to blunt the force of this evidence by focusing narrowly on two points: the alleged lack of proof of initial hiring discrimination affecting minority road drivers, and the fact that ETMF did not domicile road drivers at

San Antonio, where plaintiffs applied and were hired. We believe that terminal-by-terminal workforce data is itself sufficient to raise the inference of discrimination in initial hiring of truck drivers throughout Texas. But there is more evidence and it meets petitioners' arguments.

ETMF claims that "[t]here is no evidence in the record to support...an assertion" that "minority drivers" were hired in city driver-only terminals in disproprionate numbers"(Br. 40 n. 10).[74/] But in fact, the statistical evidence strongly supports that conclusion. In February 1972, of the 196 minority city drivers in Texas, 155 (79%) were locked in at road-driver domicile terminals. Of the 380 Anglo city drivers, only 212 (56%) were located at city-only terminals.[75/] When the 23 minority city drivers at El Paso are excluded from this computation,[76/] 155 (89%) of the other minority city drivers were at city driver-only terminals.

74/ See p. 77 , infra.

75/ Figures based on App. 352-415.

76/ This is realistic, not arbitrary,

The Southern Conference asserts that

> The make-up of city employees at terminals across the State of Texas, generally reflected the racial-national origin make-up of the respective communities in which the terminals were located.

(Southern Conference Br. 8). This assertion is manifestly untrue as to city drivers. In February 1972, there were at least 11 terminals in which all the city drivers (a total of some 141 persons) were white;[77] they are located in areas ranging from approximately 10% to 35% minority population.[78] At two other terminals in 20% minority cities—San Angelo and Longview—ETMF employed 46 Anglo

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since it is patently clear that at El Paso before 1971 all truck driver hiring was on a racial basis.

77/ They are: Abilene, Amarillo, Austin, Brownwood, Fort Worth, Lubbock, Lufkin, Marshall, Odessa, Texarkana, Tyler. Fort Worth, a city with about 29% minority population, has 35 white city drivers. See App. 352-415.

78/ Source for all population figures in this paragraph: United States Department of Commerce, Bureau of the Census, 1970 Census of Population, vol. 1, Part 45 (Texas), Tables 23, 81, 102, 108, 112.

city drivers and only two minority drivers.[79] At Dallas, with [illegible] minority population, ETMF had only 16 minority city drivers (13%) out of 123 total. All three terminals at which minority city drivers predominated had substantially higher percentages of minorities than the local population figures.[80] At no terminal in Texas did the ETMF city driver force closely approximate the racial/ethnic composition of the area in which it was located.

It is evident from the figures just cited that race and national origin were factors in staffing city driver jobs as well as road positions. The paradigm case is El Paso. Until mid-1971 all Mexican American truck drivers were hired into city jobs while all white truck drivers were being hired over-the-road (see App. 374-77). It is simply impossible to believe that all 23

79/ App. 397-98, 406.

80/ In El Paso, 54% minority population, 23 out of 23 (100%) of the city drivers were minorities. (App. 376-77) In Houston, 38% minority population, 110 (70%) out of 157 city drivers were minorities (App. 385-91). In San Antonio, 53% minority population, 41 (82%) out of 47 of the city drivers were minorities (App. 408-10).

minorities announced their exclusive interest in city work while all 50-odd whites selected road runs. The Court may well infer what actually happened in at least some cases: white and minority "truck drivers" applied for work, and were channelled into road or city driving on the basis of race. While El Paso provides the most vivid example, the picture all across Texas is essentially similar (see pp. 6-8, supra).[81/]

ETMF's attempt to explain the plaintiffs' proof of racial exclusion from road driver jobs in terms of labor markets (Br.45) is singularly unimpressive. It does not even address the racially bifurcated El Paso sitatuation, or explain why there are no minority road drivers at Dallas and no minority city drivers at Fort Worth. Likewise, ETMF's suggestion that lack of skilled minority drivers in the job market explains their absence is unconvincing. Census data for 1970 show that 39% of all truck drivers in Texas are Spanish-surnamed or Black.[82/] Moreover,

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81/ See especially p.9 n.8, supra, with respect to Houston.

82/ Source: United States Department of Commerce, Bureau of the Census, 1970 Census of Population, Vol.1, Part 45 (Texas), Table 54.

in its consent decree in the government's pattern and practice suit, ETMF agreed as a temporary hiring goal (subject to availability) that 50% of its new road driver hirees would be Spanish-surnamed or Black (App.435). This goal will remain in effect until ETMF's road driver force at each terminal reflects the minority percentage in the adult workforce of the area (id.). Moreover, after being sued in San Antonio, Dallas, and Memphis, ETMF hired 30% minority road drivers in 1972 (App. 184). There was no shortage of qualified minorities once ETMF opened its doors to them.

Petitioners rely most heavily on the fact that plaintiffs worked only as city drivers at San Antonio, where ETMF stationed no road drivers. From this they argue that there was no past hiring discrimination whose effects could be perpetuated by their lock-in devices (see ETMF Br. 45-49, 57, 59-61; Southern Conference Br. 18-22). Petitioners seek to deflect, but do not meet, the main thrust of respondents' case: ETMF's refusal to employ

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The reason most of these have in-city jobs, or work on the road for smaller independent companies rather than major Teamsters lines like ETMF, Yellow Freight, Western Gillette, or T.I.M.E.-D.C. is because the latter have historically excluded minority drivers from road positions.

minority line drivers systemwide meant that plaintiffs would have been hired as city drivers regardless of where they had initially applied. "It was their inability to gain a road driver job with ETMF at any terminal that plaintiffs decry", 505 F.2d at 55; App. 88.

ETMF points out that plaintiffs did not identify a large number of minority applicants for road driver positions at road-domicile terminals. In part this reflects the necessary and appropriate limitations on the proof of a prima facie case. In the case of San Antonio, the focus of the live testimony, plaintiffs Rodriguez and Perez, and witness Gomez, specifically testified that they would have moved to take a road position (see pp. 14-15, supra). Their willingness reflects the fact that truck drivers are more mobile than other parts of the labor force. The fact that more minorities were not shown to have applied expressly for a road driver job is also due to ETMF's exclusionary policies. Given the obvious and well-known fact that ETMF would not consider minorities for road driver positions, it is not suprising that few applied. In similar

cases, the courts have refused to condition findings of discrimination or eligibility for relief upon the making of a futile gesture of this type. See, Hairston v. McLean Trucking Co., 520 F.2d 226, 231-32 (4th Cir. 1975);[83/] Sagers v. Yellow Freight System, Inc. supra, 529 F.2d at 731, and other Fifth Circuit cases there cited; United States v. Sheet Metal Workers Local 36, 415 F.2d 123, 132 (8th Cir. 1969).

ETMF cannot hope to prove that the statistical patterns of racial exclusion resulted from anything but discrimination. Instead, it argues that plaintiffs had the burden to prove them as part of their prima facie case. The burden would be misplaced here. Plaintiffs have already presented substantial indicia--statistical and otherwise--of classwide discrimination practices. Rather than compounding their burden, it is properly

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83/ As the Fourth Circuit pointed out, "If an employer can avoid [back pay] liability through a policy which makes an attempt to gain a better job risky or futile, then this subtle form of discrimination is encouraged, not discouraged." 520 F.2d at 232.

shifted to defendants. Just last Term, this Court foreshadowed acceptance of this type of burden-shifting in a factually similar trucking case, Franks v. Bowman Transportation Co., supra. In rejecting a district court's denial of relief for failure to show "vacancy, qualification, and performance" for class members, the Court held:

> Generalizations concerning such individually applicable evidence cannot serve as justification for the denial of relief to the entire class... [P]etitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, the burden will be upon respondents to prove that individuals. . . were not in fact victims of previous hiring discrimination.

47 L.Ed.2d at 466.

The record shows that petitioner's policies were unlawful and there was a class of discriminatees who were victims of ETMF's segregated hiring. The identification of those individuals actually injured by the discrimination practices awaits second stage proceedings. But this Court's decisions in Franks v. Bowman Transportation Co., supra,

and Albemarle Paper Co. v. Moody, supra, compel the district court to conduct proceedings and exercise discretion to grant all victims of discrimination the most complete relief practicable in the circumstances. The application of an unmanageable and inappropriate standard for prima facie proof of class discrimination would leave discrimination policies uncorrected and deprive victims of discrimination of their remedy. The Court should therefore hold that respondents proved a prima facie case of past discrimination.

III. THE NO-TRANSFER RULES AND DUAL SENIORITY SYSTEM WHICH LOCKED THE PLAINTIFF CLASS OUT OF ROAD DRIVER POSITIONS WERE UNLAWFUL.

The purpose and effect of petitioners' no-transfer rules and dual seniority system were to prevent minority city drivers from obtaining road driver positions (App. 155, 174, 233). Petitioners were 100% successful in keeping their minority city drivers from Texas in their places by these means. Against the background of discrimination in hiring and assignment proved by plaintiffs, as analyzed in the preceding section, we demonstrate in this section that petitioners' transfer and seniority practices were unlawful as applied to the plaintiff class. In the following argument section, pp. 93-109 infra, we respond to several arguments by the unions that they should escape liability even if those practices violate the rights of Mexican American and Black city drivers.

A. No-Transfer Rules.

ETMF rules prohibit transfer from city to road positions and between any jobs at different terminals (see pp. 10-11, supra).[84/]

84/ The implementation of the city-to-road no-transfer rule may have varied slightly over time. The collective bargaining agreements do not specifically prohibit such transfers, but are silent on the issue; the separate contracts provide, however, for road and city seniority by terminal (App. 218; compare App. 332-2 with App. 346-7). At some point these provisions were accompanied by a strict rule barring transfers. Trinidad Gomez, a senior San Antonio city driver, testified

> Well, back in the early 60's when a member would ask, he would be told that there were two seperate [sic] contracts, that there were no transfers. Then in the late 60's, middle 60's we were told that we could transfer but we would have to lose our seniority. (App. 132)

The district court found that ETMF required a city driver seeking to transfer to the road, inter alia, to relinquish his current position, apply in writing at the terminal where he sought to drive, and relocate to that terminal (App. 58). Viewed most favorably to defendants, the no-transfer rule requires city drivers to be treated like any other new job applicants.

The impact of these rules falls mostly on Mexican American and Black city drivers. All city drivers at road driver domicile terminals had one opportunity to transfer in 1972, when one of the two no-transfer rules was

temporarily suspended (see p. 10, supra). The remaining group which has never had any opportunity to transfer includes 155 of ETMF's 196 minority city drivers (79%), but only 212 of the 380 Anglo city drivers (56%). Even these figures understate the exclusionary impact of the rules, since Anglos faced no racial bar to becoming road drivers initially, while Mexican American and Black city drivers manifestly did. The no-transfer rules therefore operate as a selection device which screens out a far higher proportion of minority than Anglo city drivers from consideration as road drivers.[85/] In this group perspective, the rules trigger the principle of Griggs v. Duke Power Co., supra, governing "[e]mployment procedures or testing mechanisms that operate as built-in headwinds for minority groups":

> ...[T]he employer [has] the burden of showing that any given requirement must have a manifest relationship to the employment in question.

401 U.S. at 432. ETMF appears to concede the

85/ Over twice as many Anglos (44%) as Mexican Americans and Blacks (21%) have had a chance to "pass" the no-transfer barrier.

applicability of this Griggs analysis, while disputing only that the company's hiring practices resulted in disproportionate minority hiring at city-only terminals. See ETMF Br. 40 n. 10; cf. p.65 , supra.

Seen from the perspective of individual minority city drivers, the no-transfer rules also operate as a lock-in device that restricts them to city jobs to which they were initially limited for racial reasons, and locks them out of road jobs from which they were initially excluded for racial reasons. In this perspective, the no-transfer rules fall under another major Griggs principle which requires courts in Title VII cases to

> remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. at 429-30. Under either analysis—from the group perspective or the individual one—the no-transfer rules are unlawful unless they can be justified by "the touch-

stone [of] business necessity," Griggs v. Duke Power Co., supra, 401 U.S. at 431.

The company has asserted that its no-transfer rules originated for and can be explained by a number of non-discriminatory reasons.[86/] But, significantly, ETMF now argues that only one of its rules is required by "business necessity," [87/] and for only one reason—that safety considerations preclude city-to-road transfers (Br. 64-66).[88/]

86/ Among the reasons advanced by ETMF are: (i) no-transfer rules make terminal managers responsible for the employees they hire (Br. 6; App. 187); (ii) they protect terminal managers from other managers' mistakes (Br. 6); (iii) they were an attempt to improve on ETMF's poor safety record by maintaining higher standards for road drivers (Br. 7, App. 162-68); (iv) a paternalistic feeling that it would be better for city drivers and their families to keep those employees at home (App. 189, 227); (v) ETMF wanted to "protect its investment" in city drivers who know their routes and customers (App. 167, 189, 227).

87/ In the present context, this Title VII term of art involves much more than a simple "demonstrable relationship to performance of the job," cf. ETMF Br. 64. The Fifth Circuit's opinion herein correctly stated and applied the settled definition, see 505 F.2d at 56-57; App. 91. See also, Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir. 1976), cert. denied, __U.S.__(Oct. 4, 1976).

88/ ETMF apparently does not now contend

ETMF's safety argument is a shallow pretext. Whatever the original reasons for the rule's adoption,[89/] the record shows that this no-transfer rule is not and never has been necessary. If ETMF's need is to require that all road drivers are qualified, it can screen transfer applicants under legitimate road driver standards. ETMF's refusal to consider any city drivers because some would not qualify is an "artificial, arbitrary and unnecessary barrier" that violates the command to "measure the person for the job and not the person in the abstract", Griggs v. Duke Power Co., supra, 401 U.S. at 431, 436. ETMF's argument that business necessity precludes transfer is also irreconcilable with its agreement to allow such transfers to the (mostly Anglo) city drivers at road-driver domicile terminals in February, 1972 as well as to hundreds of "affected class" members in the United States v. East Texas Motor Freight

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that its rule barring inter-terminal transfers has any legal justification.

89/ Even if the rules originated for non-racial business reasons, but cf. p.62 ¶vi, supra, this would be legally irrelevant unless the rules are presently justifiable, see Griggs v. Duke Power Co., supra, 401 U.S. at 431-2.

consent decree (App. 431-3). No appellate court has ever accepted this "ubiquitous" no-transfer rule as a business necessity.[90/]

This Court should, on this record, endorse the universal view of the Courts of Appeals that no-transfer rules are not justified as a business necessity. Since they are not, and since they perpetuate the past hiring discrimination and disproportionately exclude minority city drivers, the Fifth Circuit correctly held them unlawful employment practices.

B. The Application of the Dual Seniority System to the Plaintiff Class in This Case Was an Unlawful Employment Practice.

Petitioners' dual seniority system—with separate seniority units for city and road drivers and seniority measured in each by date of entry into the unit—also deprived the plaintiff class of Title VII rights. Minority city drivers, initially barred from

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90 / See, e.g., Bing v. Roadway Express, Inc., supra [Bing I]; Jones v. Lee Way Motor Freight, Inc., supra; Sagers v. Yellow Freight System, Inc., supra; Sabala v. Western Gillette Co., 516 F.2d 1251 (5th Cir. 1975); United States v. Navajo Freight Lines, Inc., supra; Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), rev'd on other grounds, 47 L.Ed. 2d 444 (1976); Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974).

road positions by ETMF's white-only hiring policy, cannot now move to road driver jobs without forfeiting their accrued seniority. Despite ETMF's no-transfer rules, these seniority barriers are additional obstacles to be reckoned with. Each of the three plaintiffs and Trinidad Gomez, when they applied in writing for transfer to the road, were made to sign a statement that

> I fully realize that if I am accepted as a road or line driver I will loose [sic] my city seniority from the date of my employment.

(App. 324-7).[91/] Title VII prohibits infliction of this type of seniority penalty when minority workers move into a position from which they were initially excluded because of race. ETMF does not argue the lawfulness

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91/ ETMF's counsel emphasized the seniority obstacles to transfer in cross-examination of Trinidad Gomez:

> Q: ...Were you willing to give up 18 years of seniority...to be at the bottom of the road driver's roster...[where] your chance for steady work might be very remote...and you might not get any work at all, with no seniority?

(App. 131-2) Counsel pursued the same line of

of its seniority system. Both union petitioners, however, defend the system and contend that no modification of anyone's seniority position is warranted.

1. The Court Must Reach the Seniority Issue.

The union's first argument is that the Court should not reach the substantive validity of the seniority system because, as a result of the no-transfer rules and the absence of road driver jobs at San Antonio, no party was injured by its operation (So. Conf. Br. 18-23). That argument ignores the simple fact that under the union contracts drivers cannot "transfer" from the city seniority list to the road list without taking a new seniority date at the bottom of the list (App. 218). For this reason and those set out below, the Court must reach the issue of the system's validity.

The lawfulness of the seniority system must be decided to resolve the class claims. If the Court agrees with our analysis of the class action issue, pp. 26-47, supra, the

questioning with plaintiff Herrera, who indicated that the threat was a serious obstacle to him (App. 299-300; see also App. 127).

union's argument becomes frivolous. The record makes evident that at some terminals Anglo and minority driver applicants were hired into different units according to race. It would be an exercise in futility to grant these class members relief from the no-transfer rules without also granting a seniority remedy. Seniority forfeiture would still stand as a formidable artificial barrier to transfer, in violation of Title VII's purpose of removing all such barriers, Griggs v. Duke Power Co., supra, 401 U.S. at 436, and of allowing victims of discrimination the most complete relief practicable, Franks v. Bowman Transportation Co., supra, 47 L.Ed.2d at 461. For any city drivers found to have been discriminatorily excluded from road driver positions, the remedy must include seniority carry-over, see Bing II, supra, and Sagers v. Yellow Freight Co., supra.[92/]

92/ The Southern Conference notes that courts found the presence of a no-transfer rule reason to release unions from liability for seniority discrimination in Thornton v. East Texas Motor Freight, supra, and Jones v. Lee Way Motor Freight, supra. But in Thornton, the only union remaining in the case on appeal was the local, which had apparently not been named in the plaintiffs' EEOC charge and which had, moreover, actively

Even if the Court finds the class action approved by the Fifth Circuit too broad, the claims of the named plaintiffs and other San Antonio city drivers squarely raise the seniority issues. Plaintiffs and all other Mexican American or Black city drivers in San Antonio were hired before 1970 (and almost all before 1967), when ETMF had a flat policy against hiring minority road drivers (App.408-10).[93/] For plaintiffs or other class members to have applied for road positions in 1959 or 1965 would have been a futile act, as they

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sought through contract negotiation proposals to eliminate ETMF's no-transfer rule. The Sixth Circuit also noted that the Southern Conference (not the local) was responsible for the collective bargaining agreement in issue. The court's holding was closely tied to these unusual circumstances (see 497 F.2d at 423-6). In Jones, the private plaintiffs simply never joined any union defendant. The Teamsters International (IBT) was made a party to Jones' successor action, United States v. Lee Way Motor Freight Co., 7 EPD ¶9066 (W.D. Okla. 1973), in part to cure any deficiency in the relief awarded against the employer alone in Jones. Courts have found unions liable for seniority discrimination despite presence of a company no-transfer policy in Sagers v. Yellow Freight System, Inc., supra and Bing II, supra.

93/ All other minority city drivers throughout Texas were also hired before 1970.

well knew. They took the only truck driving positions then open to them. At the same time, they expressed interest in moving to road driver positions outside San Antonio, if the no-transfer rules could be overcome. At this point the dual seniority system became "operative" in their own cases, see pp. 81-82 , supra. Since they, too, were subjected to exclusionary practices, they have a present right to transfer with augmented seniority.

2. Defendants' Seniority System Is Not Bona Fide.

The Southern Conference next argues that the system of separate units for city and road drivers is a "bona fide" seniority system protected by §703(h) of Title VII, 42 U.S.C. §2000e-2(h) (So. Conf. Br. 23-36). To analyze the union's argument in context, it is necessary to recall what seniority relief plaintiffs seek: not dismantlement or fundamental change of the seniority system, or even the merger of separate rosters into a single list. All plaintiffs seek—and what the Fifth Circuit ordered—is opportunity for qualified class members to transfer from city to road

jobs with carry-over seniority.[94] This Court noted the limited nature of this type of relief in Franks v. Bowman Transportation Co., supra, 47 L.Ed.2d at 457-8. The transfer remedy raises none of the problems under §703(h) which might be presented by a radical restructuring of the separate seniority lists, see Patterson v. American Tobacco Co., 535 F.2d 257, 266-7 (4th Cir. 1976).

An employer's hiring decision may not affect the bona fides of a seniority system per se, as the Southern Conference argues (Br. 26), see Franks v. Bowman Transportation Co., supra, 47 L.Ed.2d at 458. But such discrimination does make application of seniority rules to victims of exclusionary hiring practices discriminatory, id. at 458. And a seniority system that discriminates against members of a protected group is by definition not bona fide. Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 995-6 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970);

94/ The amount of seniority carried over upon transfer would be determined by the "qualification date" formula announced in Bing v. Roadway Express, Inc., 485 F.2d 441,

United States v. Bethlehem Steel Corp., 446 F.2d 652, 658-9 (2nd Cir. 1971).

With considerable audacity, the unions argue that the dual seniority system of the trucking industry is lawful, even though the analytically indistinguishable systems of all other industries have been repeatedly held illegal. In effect they invite this Court to overrule caselaw now settled in all circuits, which this Court has repeatedly refused to review: the progeny of seminal decisions in Quarles v. Philip Morris, Inc., supra, and Local 189, United Papermakers and Paperworkers v. United States, supra.[95] This is, of course, not the first case in which defendants try to justify their dual seniority system by claiming that it operates in a unique industry which

451 (5th Cir. 1973) and adopted below in the instant case (505 F.2d at 63-4, App. 105-6).

95/ Defendants' seniority system has the same defects as those in three other cases, from three different industries, in which this Court has dealt with related discrimination practices; in each case the Court of Appeals had correctly analyzed and remedied the seniority problems and defendants had not sought review here. See, e.g., Franks v. Bowman Transportation Co., 495 F.2d 398, 414-17 (5th Cir. 1974), rev'd and rem'd on other issues, 47 L.Ed.2d 444 (1976); Moody v. Albemarle Paper Co., 474 F.2d 134, 137 (4th Cir.

sets it off from other, unlawful systems.[96] But the reasons advanced by the unions for differentiating their seniority system from others just like it are unusually unimpressive.[97]

(i) The Southern Conference and Local 657 stress that the contract seniority rules are neutral on their face. This is immaterial in Title VII litigation:

1973), vac'd and rem'd on other issues, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 420 F.2d 1225, 1230 (4th Cir. 1969), rev'd on other issues, 401 U.S. 424 (1971).

The Court of Appeals decisions in Franks, Moody, and Griggs, like those in Quarles and Local 189 and their progeny, follow the analysis of seniority issues outlined in two leading law review pieces: Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969) and Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 HARV. L. REV. 1260 (1967).

96/ Cf. United States (Ford) v. United States Steel Corp., 520 F.2d 1043, 1058 (5th Cir. 1975); United States v. Jacksonville Terminal Co., 451 F.2d 418, 454 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).

97/ Some of the reasons which the unions suggest justify finding their seniority system "bona fide" would appear to pertain more directly to the question of the unions' liability then to that of the system's legality. These issues are discussed in the following section at pp. 102-9, infra.

> Under the Act, practices, procedures and tests neutral on their face and even neutral in terms of intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

(ii) The Southern Conference claims that it has never "used" or "intended" job seniority rules to obstruct the grant of "rightful place" seniority to individuals who are bold enough to complain. This dubious assertion is legally irrelevant. The argument apparently depends on a subjective definition of intention that has no place in Title VII law. See Griggs v. Duke Power Co., supra, at 432. The accepted meaning of "intent" in Title VII is simply, "that the defendant meant to do what he did, that is, his employment practice was not accidental." Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006 (1971); Griggs v. Duke Power Co., 401 U.S. at 432. The effect of unit seniority is to prevent minority city drivers from moving to road jobs; this constitutes a Title VII violation.

(iii) Both union petitioners emphasize that the separate seniority units allegedly were not initially created for the purpose of excluding minorities (although they subsequently had that effect). This factor does not distinguish this system from others routinely found unlawful. Even in cases where the discriminatory system had been imposed by earlier federal government action or approved by federal courts, the Quarles-Local 189 analysis applies to invalidate dual seniority systems under Title VII.[98/]

(iv) The Southern Conference finds a significant distinction in the fact that road and city jobs are not tied together by a line-of-progression seniority structure, and that city jobs are not supposedly more menial than road jobs. While city driver jobs pay decent wages, road driver jobs pay more.[99/] Road

98/ See, e.g., United States v. Chesapeake & Ohio Rwy. Co., 471 F.2d 582, 587 (4th Cir. 1973), cert. denied 411 U.S. 939 (1973); United States v. Jacksonville Terminal Co., 451 F.2d at 453-4; Taylor v. Armco, 429 F.2d 498 (5th Cir. 1970); cf. Whitfield v. United Steel Workers of America, 263 F.2d 546 (5th Cir. 1959), cert. denied 360 U.S. 902 (1959).

99/ The Southern Conference admits that "many road drivers nevertheless have an opportunity to earn a larger annual salary than

driver positions are the prestige, sought-after jobs in the industry. The voluminous trucking litigation reflects city driver efforts to open up road driver opportunities—not road driver attempts to move to city runs. In any event, the union's points are distinctions without a difference. Title VII does not allow limitation of minorities to certain jobs, even if they are relatively good ones. Any racial barriers must come down, Griggs v. Duke Power Co., supra, even if there were no demonstrable economic disparity, Swint v. Pullman-Standard Co., 539 F.2d 77, 89-93 (5th Cir. 1976).

The Fifth Circuit's decision correctly applied established caselaw governing the identification and remediation of discriminatory seniority systems. The ETMF-Teamsters seniority system is discriminatory insofar as it would deny to class members previously excluded from road driver positions an oppor-

that paid to city employees" (Br. 7). In fact the difference is enormous. In Sagers v. Yellow Freight System, Inc., supra, the average difference for two years was $4,918 and $3,632 (529 F.2d at 726 n. 7). Yellow Freight's pay rates were governed by the same Southern Conference contracts as ETMF's. In the government's ETMF case, the company stipulated that

tunity to transfer with appropriate carry-over seniority. To that extent, it is not protected by §703(h).

The Fifth Circuit did not, as the Southern Conference claims, assume or find that every individual minority city driver had been injured by the existence of the dual seniority system. Nor did it order all such persons transferred to road jobs or fault petitioners for failing to achieve such transfers, as the Southern Conference alleges. Rather, the Court of Appeals held that petitioners' seniority arrangements discriminate against the class as a whole and deny class members a chance to seek road driver positions. It ordered only that individual class members who wish to transfer be given a chance to bid and qualify under non-discriminatory standards (505 F.2d at 62; App. 102-4). None of the defendants will lose the opportunity to prove at Stage II that any individual is not entitled to relief. But the detailed evidence going to those individual determinations is not, and should not be, an element of prima facie proof that the seniority system operates to discriminate against the class as a whole.

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in each of three years road drivers out-earned city drivers by $3,000 to $5,000. See p. 290 of Exhibit cited at n. 66, supra.

IV. THE UNIONS ARE LIABLE FOR THEIR PRACTICES OF DISCRIMINATION AGAINST THE CLASS AND FOR ACQUIESCING IN THE EXCLUSION OF MINORITY CITY DRIVERS FROM ROAD JOBS.

A. The Unions Did Nothing to Assist Plaintiffs or Other Minority City Drivers To Obtain Road Driver Positions

Although the named plaintiffs and other minority city drivers repeatedly sought assistance from the union defendants in obtaining road driver jobs, none was forthcoming. The named plaintiffs testified that they made repeated efforts to communicate to Local 657 their inability and desire to obtain transfer opportunities to go from city driving in San Antonio to road driving at an ETMF terminal; Plaintiffs Jesse Rodriguez, (App. 119-20), Modesto Herrera (App. 125-7) and Sadrach Perez (App. 136, 244) all testified as to personal requests they made to Local 657 President Ray Shafer and other union officials.[100/] Shafer's usual response to these

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100/ Some of these contacts began as early as 1965-6 (App. 125, 136). Most were triggered by the 1970 merger into ETMF of Valley Copper State, another trucking company which had a small San Antonio road operation (App. 126, 119).

inquiries was to state that transfer was impossible because of the separate seniority lists for road and city drivers (App. 126, 136). He also contacted ETMF's vice president in charge of industrial relations following plaintiffs' 1969 and 1970 inquiries (App. 252, 195). The responses Shafer relayed from ETMF were that the ETMF terminal manager in San Antonio should not advise city drivers there of vacancies elsewhere (App. 252-3), and that if ETMF decided to domicile road drivers in San Antonio, it would consider local city drivers for those positions (App. 193). This answer was of course unresponsive to plaintiffs' inquiry, since there were no road driver slots at San Antonio. There is no evidence that Local 657 made any further efforts to help any San Antonio city driver obtain a road job. Indeed, the record reflects Local 657's continuing position that the dual seniority system is immutable and no seniority carryover can be allowed.

In addition, on December 1, 1970, Plaintiff Perez and five other Mexican American city drivers wrote a letter to Frank Fitzsimmons, President of the International

Brotherhood of Teamsters, stating,

> One of the things that we are unhappy with is that all of the long haul drivers who make real good money are Anglo and not Mexican Americans or Blacks.

(App. 327)[101/] Fitzsimmons' response, dated December 4, 1970, was to forward a copy of his correspondence to the Vice President and Area Director of the Southern Conference of Teamsters in Dallas, Texas, for his attention (App. 330). The record does not disclose any action taken by the Southern Conference on this complaint. On the contrary, the only deviations from the no-transfer rules permitted by the Southern Conference have benefitted Anglo drivers almost exclusively. Thus, under the Southern Conference- wide bumping provisions for road drivers (see p.10 n.9), an Anglo road driver can transfer with full seniority over 1000 miles from Atlanta to San Angelo, but a city driver from San Antonio cannot move the 241 miles to San Angelo.

101/ Perez had also repeatedly complained to Shafer and other Local 657 officials about ETMF's discriminatory refusal to consider him for a road position (App.244-50).

And the 1972 transfer opportunity for some city drivers brought no relief to most of ETMF's minority drivers, or anyone in the Local 657 jurisdiction.[102/]

The unions' discriminatory actiors and omissions in this case are not, therefore, limited to being parties to collective bargaining agreements which locked city drivers out of road positions. The unions a.e also implicated in ETMF's exclusionary road driver hiring practices to the extent that they were a referral source for applicants (see p.13, supra). There is no indication that minority road applicants were ever referred. The unions had long years of notice of the complaints of minority city drivers, but offered no relief. The total record of their conduct leaves no doubt that they consistently advanced the interest of Anglo members, and ignored the aspirations of Mexican American and Black members.

102/ See pp.75-76 supra. The 1972 transfer plan was approved by the same individual- Mr. Murray Miller, IBT Vice President and Area Director of the Southern Conference- to whom IBT President Fitzsimmons had referred plaintiffs' letter seeking assistance in securing road driver opportunities (App. 230-1). Mr. Murray did not question the exclusion of all

B. Both Local 657 and the Southern Conference Are Liable For the Discrimination Practiced Against the Class.

Each union defendant urges that, even if some other party discriminated against minority city drivers, it should not be held responsible. Thus, the Southern Conference emphasizes that ETMF was solely responsible for hiring (Br. 18, 31) and for the no-transfer rule (Br. 9, 19)--even though the latter may have been no more than a reformulation of the consequences of the dual seniority system, see n. 84, supra. Local 657 also blames ETMF for the hiring and no-transfer policies (Br. 7, 18-19, 21, 23-4). It also asserts that it has never been party to a contract covering road drivers and has no power to negotiate any area-wide contracts (Br. 9-10, 19-20).[103/]

The unions' efforts at blame-shifting should not deflect attention from two basic facts: all defendants are amply implicated in the creation and maintenance of discrimina-

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drivers at city-only terminals, including over three-quarters of ETMF's minority city drivers (App. 231).

103/ While Local 657 refrains from pointing a finger toward the Southern Conference, the latter, as well as ETMF, would appear to be the logical target of its reasoning.

tory employment systems, and all are necessary and proper parties for purposes of relief. The extent to which the Southern Conference is responsible for the imposition and enforcement of rules restricting access to road driver jobs can hardly be overemphasized. Collective bargaining and indeed all labor-management relations in the long-haul trucking industry are subject to the powerful influence the International Brotherhood of Teamsters. The IBT maintains tight control over regional and local practices through a highly centralized internal union structure and collective bargaining arrangements. In bargaining for and enforcing contracts, the IBT operates through subordinate bodies at the conference level; the Southern Conference is one of these. The Teamsters' inter-union relationships and their bargaining procedures are accurately described in detail in Sagers v. Yellow Freight System, Inc., supra, 529 F.2d at 737, United States v. Navajo Freight Lines, supra, 525 F.2d at 1321-2, and Freeman v. Motor Convoy, Inc., supra, 409 F. Supp. at 1109-10.[104/]

104/ The Fifth Circuit summarized them in this case as well, see 505 F.2d at 60; App. 72.

In light of these facts, it is appropriate to hold all the union entities liable for their mutually-created systemic discrimination practices, and subject them all to injunctive remedies.[105/] Without a finding of discrimination on the part of all defendants, the court on remand might lack the basis for awarding the complete relief to which plaintiffs are entitled.

C. The Unions Breached Their Duty to Act Affirmatively to Protect the Rights and Interests of Minority Employees.

Title VII reinforced and expanded earlier legal authority which requires unions to take an active role in promoting equal employment

105/ The relative degree of fault or responsibility of the defendants is pertinent only to apportionment of monetary liability, including back pay. Consideration of that issue would be premature, since the Fifth circuit did not determine or find any monetary liability at this stage. Cf. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381-2 (5th Cir. 1974); United Transportation Union, Local Union No. 974 (Rock) v. Norfolk & Western Railway Co, 532 F.2d 336, 341-2 (4th Cir. 1975), cert. denied 48 L.Ed. 2d 175 (1976).

opportunities for minority members and other employees.[106] Unions must do more than avoid overtly discriminatory actions. Title VII does not allow them to accept passively the discriminatory practices of employers with whom they bargain. Macklin v. Spector Freight System, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973). Accord: Patterson v. American Tobacco Co., supra, 535 F.2d at 270; Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372, 1379 (5th Cir. 1974).

The union petitioners' actions in maintaining and defending their dual seniority system, failing to insist on modification of ETMF's no-transfer rule, and resisting plaintiffs' attempts to gain road driver jobs fall far short of these standards. The unions have preserved intact the systemic policies which bar approximately 200 minority city drivers in Texas from ever having had an opportunity to drive over the road. The Southern Conference's claim to have made a late conversion to the principle of "rightful place" seniority rings hollow. Initially, it

106/ See, e.g. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953).

contradicts positions of uncompromising opposition to any relief for any minority city drivers taken by it and other Teamsters unions in years of previous litigation[107] and in this litigation-- up to the Supreme Court stage. More important, the Teamsters would drastically limit the availability and impact of "rightful place" seniority by subjecting persons who seek it to virtually insuperable barriers of proof. The Teamsters would condition awards of "rightful place" seniority upon proof that the individual performed the futile act of specifically applying for a road position, and would make him prove the existence of his qualifications and a specific vacancy, often at a distant-past time. Cf. Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974). The unions propose that all this proof would be part of plaintiffs' prima facie case. Under such standards, trucking industry plaintiffs would rarely prevail, and never on behalf of an entire class. That result is, of course, the unions' underlying interest.

107/ The Teamsters, including the Southern Conference, have probably been sued and beaten under Title VII more often and more widely than

Far from seeking to assure equal opportunities, the unions continue to thwart them, This Court should hold them liable for failing to discharge their affirmative obligations.

D. The Unions Show No Valid Reason to Excuse Them From Liability For the Discriminatory Practices.

The reasons advanced by the unions in an effort to avoid liability for their discriminatory practices are invalid. Each is at best a lame excuse that is not legally cognizable.

1. The NLRA obligations of Local 657.

Local 657 argues that the National Labor Relations Act, as amended, 29 U.S.C. §151 et seq. (hereinafter NLRA), bars the union from singularly effecting change in national and regional collective bargaining agreements. Therefore, Local 657 contends, it should not be held liable for failing to effect some type of seniority carryover to eliminate the continuing effects of discriminatory hiring practices (Local 657 Br. 14-20).

Local 657 in effect argues that its NLRA

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any other union in the country. Until recently, its uniform position was that there was no discrimination and no need for any relief.

responsibilities superceded its Title VII obligations, and in support of its position cites Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 73 n. 26 (1975) (hereinafter "Emporium Capwell"), Local 657 Br. 20. The local's quotation truncates that crucial footnote, omitting the following language:

> Since the Senator's remarks were directed to the suggestion that enactment of Title VII would somehow constrict an employee's access to redress under other statutory regimes, we do not take them as foreclosing the possibility that in some circumstances rights created by the NLRA and related laws affecting the employment relationship must be broadened to accomodate the policies of Title VII.

(emphasis supplied) The Policy basis of Emporium Capwell is directly contrary to Local 657's position. Reaffirming a statement first make in Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), this Court wrote:

> Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority,... and it is a commonplace that we must construe the NLRA in light of

> of the broad national labor policy of which it is a part.

420 U.S. at 66.

Local 657 asserts in several ways that, because of NLRA obligations, its hands were tied. It opines that it could not unilaterally modify the collective bargaining agreement, that ETMF would never have agreed to changes the unions might have proposed, and that Local 657 was bound to the system negotiated for it by the Southern Conference and the IBT negotiating committee. These arguments ignore the local's responsibility to advance and represent the interests and minority members, under both the NLRA and Title VII, see Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 16-24 (5th Cir. 1966), cert. denied 389 U.S. 837 (1967) Guerra v. Manchester Terminal Corp., 498 F.2d 641, 650-1 (5th Cir. 1974). Although it might not have succeeded, Local 657 and the Southern Conference were obligated to try to obtain suitable seniority modifications that would permit minority city drivers in San Antonio to transfer to road driving jobs.[108] The asserted fact that ETMF might

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108/ Local 657's reliance on NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958), is misplaced. Borg-Warner holds that although one party may not insist on a matter outside the coverage of the NLRA, bargaining need not be so confined, 356 U.S. at 349. While rights to jobs outside Local 657's jurisdiction may not have been mandatory subjects for bargaining under the NLRA, Title VII imposed reciprocal obligations on the unions and ETMF to negotiate access to those jobs for minority members of Local 657 who were victims of discrimination.

not have agreed to any modifications to the collective bargaining agreement to permit such transfers is both speculative and not dispositive as to union liability. Plaintiffs have never insisted on unilateral abrogation of seniority provisions or of negotiating authority; they maintain that all parties were obligated to agree on appropriate remedial measures. But since all the parties to the bargaining failed to accommodate their agreement to law, all are jointly liable, Emporium Capwell, supra, 420 U.S. at 69-70; Robinson v. Lorillard Corp., supra, 444 F.2d at 799.[109]

109/ If inability to effect unilateral changes were a complete defense, then no party could be held liable for the discrimination. This anomalous result is unacceptable.

2. Discriminatory preferences of union members.

Both union defendants raise the purported preference of union members for the discriminatory seniority system as grounds for relieving the unions of liability (So. Conf. Br. 32, Local 657 Br. 18, 22). Local 657 ties this argument to its NLRA defense. But in any context, the preferences of union members, even if they represent a majority of the affected employees,[110/] cannot validate a discriminatory seniority system:

> "If relief can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."

Franks v. Bowman Transportation Co., Inc., supra, 47 L. Ed.2d. at 468, quoting United States v. Bethlehem Steel Corp., supra, 446 F. 2d at 663. Moreover, the unions direct their arguments against a hypothetical target.

110/ This is not the case here. In neither the Southern Conference region nor Local 657 do minority city drivers of ETMF form a majority. And at the national level, where the contracts are fashioned, minority city drivers' particular interests are insignificant.

Respondents do not seek, and the Fifth Circuit did not order, a merger of the separate units or any such broad transfer rights as were discussed at the post-trial membership meeting of Local 657.[111/]

Unions are bound to accommodate the preferences of their members to legal requirements. Robinson v. Lorillard Corp., supra, 444 F.2d at 799. To do so is not "reverse discrimination", but compliance with the law.

3. Other reasons advanced by the unions.

Both union petitioners attribute some significance to plaintiffs' failure to seek their remedy through the formal contract

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111/ The minutes of the "special meeting" of freight line members of Local 657 on February 11, 1973 show the distortion of a proposal for implementing Article 37 and 38 (non-discrimination) in the contract to provide for transfer from the city to the road. During discussion, Local 657 President Shafer expanded the limited proposal into a system-wide seniority change requiring merger of all contracts into one (App. 49, 50). The proposal was thus easily defeated. The alternative of a trial transfer was likewise posed as one without any carryover seniority. (App. 52) The minutes tend to confirm that the post-trial (but pre-decision) meeting was a litigation ploy.

grievance machinery or otherwise to complain to the union about its seniority system. Apart from its futility, such resort is irrelevant here. There are only two procedural prerequisites to filing a Title VII suit; both are prescribed in §§706(a), (e) of the statue, 42 U.S.C §§2000e-5(a), (e), McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 798. Complaining to a defendant party through internal grievance procedure is not one of them. Title VII remedies are independent of and additional to any available grievance-arbitration procedures, Alexander v. Gardner-Denver Co., supra, 415 U.S. at 48-49.

Both unions also make much of the fact that Teamsters locals, including 657, have not been segregated. But the presence of segregated locals does not justify racist practices. Some industires characteristically had segregated local unions; others, among the worst in terms of employment discrimination, developed different patterns of racial exclusion. The legal difference is not significant. A union that maintains

"integrated" locals [112/] and is party to discriminatory practices violates §703(c)(2) of Title VII, 42 U.S.C. §2000e-2(c)(2).

In sum, both unions pose as innocents, who neither knew anything was wrong, not could have done anything about it if they had. More implausible posturing by Teamsters unions is hard to imagine, see n. 107, supra. This Court should cut through the various smoke-screens thrown up by the unions and should implement Congress's purpose in enacting Title VII, by holding defendants accountable for the discriminatory effects of their intentional practices.

112/ The union petitioners claim that Local 657 is "controlled" by minorities (Southern Conf. Br. 29). While Mexican Americans and Blacks may be in the majority at the local level, the Teamsters' extraordinarily centralized collective bargaining contracts and negotiating procedures, see p. 98, infra, deprive the unions' point of much significance.

V. THE DISTRICT COURT ERRED IN PREMATURELY EVALUATING PLAINTIFFS' QUALIFICATIONS AND IN USING IMPROPER STANDARDS FOR THAT EVALUATION.

A. The District Court Erred in Reviewing Plaintiffs' Qualifications Even Though ETMF Never Considered Their Applications.

It was error for the district court to pass on plaintiffs' qualifications when the company had never considered them in determining plaintiffs' eligibility for road jobs. Until litigation commenced, ETMF refused to consider plaintiffs' applications on racially tainted grounds without even reviewing their qualifications, even by purported company standards.

For many years, plaintiffs were virtually prevented from filing formal written applications. During this time, they repeatedly approached both union and company officials regarding transfer.[113/] Every

113/ With regard to contact with union officials, see pp. 14-15, 93-5, supra. Plaintiffs also spoke to many company officials about transfer. For example, Mr. Rodriguez spoke with Ezra Beierle, an employee in the management division, shortly after the 1970 merger with VCS (App. 118, 120, 285). Mr. Perez spoke repeatedly with Mr. Truitt, an

person plaintiffs contacted told them that the no-transfer rules prevented consideration of their requests for transfer. In 1970, shortly after ETMF's merger with Valley Coperstate System (VCS), plaintiffs' requests became more persistent (App. 120, 268, 273, 244, 251). But since ETMF continued to refuse consideration of plaintiffs' applications, plaintiff Rodriguez ultimately filed charges with the EEOC on August 20, 1970 (App. 318). The next day, plaintiffs and Mr. Gomez were called into the terminal manager's office to sign company-prepared letters of application for road jobs (App. 324-7, see App. 268-9). Yet, ETMF even then refused to consider or properly evaluate plaintiffs at all. Normal procedure would have required that their written applications be forwarded to Dallas for initial consideration, where ultimate road driver hiring decisions are made (see p. 12, supra). However, plaintiffs' written applications were filed away in San

ETMF terminal agent, and to Mr. Sager, the San Antonio terminal manager (App. 240-1, 268-9). In 1965, Mr. Herrera asked Mr. Asbury, then terminal manager at Dallas, both for a road job and about the application procedure (App. 290-1).

Antonio and were not forwarded to Dallas until six months later, after the start of the EEOC investigation of plaintiffs' allegations that ETMF excluded minorities from road driver positions (App. 318-321).

Even after the Dallas office finally received plaintiffs' applications, they still received no consideration based on their qualifications. Mr. Maier testified at trial that he merely "reviewed" plaintiffs' applications in a very cursory fashion since he

> saw that under the circumstances that they were not in a position as such that we would consider their applications. They were city drivers and the policy has already been testified to, it is a no-transfer policy.

(App. 190)[114/] Maier also testified that even if the applications had been sent promptly to Dallas, "nothing would have changed because of our policy that was established does not allow for transfer"(App. 191).

Thus, it is clear from the defendant's

114/ Mr. Maier also testified that he considered this studied neglect to be "appropriate action" in his capacity as affirmative action coordinator. (App. 190)

inaction on the applications and the ultimate rejection of plaintiffs based merely on their status as city drivers that ETMF never considered their ability to perform as over-the-road drivers. Despite this admitted fact, at trial ETMF defended on the grounds that plaintiffs were poorly qualified. In preparation for trial, ETMF went to great lengths to compile evidence that named plaintiffs had poor accident and injury records in order to legitimize their rejection. The fact that the great bulk of company charges and complaints against plaintiffs followed their written transfer requests and the filing of EEOC charges in late August 1970 strongly suggests that that evidence was at best pretextual, cf. McDonnell-Douglas Corp. v. Green, supra, 411 U.S. at 803-5.[115/]

Throughout trial, plaintiffs objected to this line of testimony and the court's admission of evidence on plaintiffs' qualifi-

115/ For example, testimony with respect to plaintiffs' allegedly poor work performance was specifically limited to the post-1970 period (App. 158-9). And, of the eight incidents on which the district court relied, at ETMF's urging, to find plaintiff Perez unqualified, only one is alleged to have occurred during the first eleven years of his

cations on the grounds that the issue was not before the court since the company never gave any consideration to plaintiffs' qualifications (Tr. 18, App. 122).[116] The court overruled these objections. Furthermore, the district court erroneously accepted ETMF's evidence in making its determinations (App. 64). See part B, pp.116--120, infra. The Court of Appeals held those determinations "premature" and aptly observed, "The question with regard to the named plaintiffs is not whether they were qualified, but whether ETMF's failure to consider their application was discriminatory," 505 F.2d at 63; App. 104.

The Fifth Circuit's decision is logical and consistent with similar decisions by other

employment; the other seven followed in rapid succession in the eight months after August 1970 (App. 61-3). Furthermore, the only two warning letters ever received by Mr. Rodriguez for any alleged incidents were both given in 1971—after the Dallas office learned that plaintiffs had filed EEOC charges (App. 123, 321).

116/ The Fifth Circuit's construction (505 F.2d at 52; App. 82) of plaintiffs' stipulation as to the issues for proof at trial (App. 115 ¶8, 419 ¶8) is consistent with these objections. Cf. p. 32, supra.

appellate courts. See, e.g., Young v. Edgcomb Steel Co., 499 F.2d 97 (4th Cir. 1974);[117] East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975);[118] and Muller v. United States Steel Corp., 500 F.2d 923 (10th Cir. 1975).[119] Each of these decisions views with appropriate suspicion the post-facto "qualifications" reasons advanced by employers in Title VII litigation, when the company's earlier rejection was based

117/ In Young, the employer had denied plaintiff promotion on the basis of his performance on an unlawful test. At trial the employer advanced a different reason for the denial, which the company had not previosuly considered. The Fourth Circuit held that it was error to find plaintiff unqualified on the basis of the second reason.

118/ Ms. East, a welder, was denied a job in part because of information obtained when Romine checked her background with other employers. But Romine did not similarly check the backgrounds of male welder applicants hired in her place. The Fifth Circuit held that, in the absence of such checks, the district court erred in relying on the reasons asserted by Romine for rejecting East, see 518 F.2d at 339-40.

119/ In Muller, the Tenth Circuit affirmed a judgment finding discrimination where the employer had not considered Muller for a promotion he sought and where the lack of objective criteria for the position precluded any determination that others were more qualified than Muller. 509 F.2d at 929.

on completely different reasons or on standards not ordinarily utilized.

Whether plaintiffs are actually qualified as road drivers remains to be determined under proper standards. But the record conclusively shows that the summary rejection of their applications was discriminatory.

B. It Was Improper to Evaluate Plaintiffs Under Standards Which ETMF Did Not Require Anglo Road Drivers to Meet.

Even if the district court could properly have reviewed plaintiffs' qualifications as road drivers—despite ETMF never having done so—it erred in applying ETMF's announced standards for hiring. Those standards were purely theoretical: ETMF did not adhere to them when it hired Anglo road drivers.

The district court accepted ETMF's assertions as to its hiring standards at face value. Those purported standards were: a 27 year minimum age, an acceptable weight range, high school education or equivalent, good driver safety record, and three years "immediate prior" road driving experience (Pl. Ex. 28, p.29). The district court focused on plaintiffs'stipulation that those standards were not in themselves discriminatory (since they were neutral on their face) (App. 59). But

as the Fifth Circuit noted with respect to the experience element of these standards,[120] plaintiffs' stipulation should not be read to have waived their claim that application of these criteria to them was discriminatory (505 F.2d at 59, App. 96-7).

The district court's reliance on the inability of plaintiffs to meet "all of the qualifications for a road driver position according to the company manual due to age or weight or driving record" (App. 64) overlooks the fact that many successful Anglo applicants did not satisfy the same company manual standards. Plaintiffs' counsel read into the record at trial the names of 12 such individuals, hired after the filing of plaintiffs' written applications, who did not have the supposedly requisite amount of education (App. 181), and identified other Anglos whose poor driving records, including serious accidents, did not measure up to the safe driving record standard (Tr. 291-3, not reproduced in Appendix).[121]

120/ The Fifth Circuit analyzed the three years' experience requirement at length and correctly concluded that as applied to minority city drivers it was unlawful. 505 F.2d at 58-59, 62; App. 95-97; 102.

121/ The road driver applications of these persons are in the record. A number of attach-

Moreover, as previously noted, the more extensive Justice Department investigation of ETMF's hiring practices revealed scores of instances in which applicants unqualified by announced standards were hired, see p. 62 ¶iv, supra. And Judge Hughes specifically found in United States v. East Texas Motor Freight, supra, that the company had failed to follow each of its purported standards in many instances, see pp. 11-12, supra.

Even if ETMF had used these criteria as reasons for denying plaintiffs' applications—and it did not, except in the litigation phase, see part A, supra—it would have violated Title VII in doing so. It is basic Title VII law that an employer may not require minority applicants to meet higher or different qualification standards than similarly situated whites. See, e.g., EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.11 (1970).[122/] This Court recognized that prin-

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ments to plaintiffs' exhibit 28, the White deposition, are also applications of Anglos hired as road drivers who did not meet the purported standards.

122/ This section of the guidelines, to which this Court gives deference, Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431, states:

ciple when, in remanding Franks v. Bowman, supra, it emphasized that class members' qualifications for road driver jobs had to be evaluated "under nondiscriminatory standards actually applied by Bowman to individuals who were in fact hired", 47 L.Ed.2d at 466 n. 32 (emphasis in original). Application of disparate standards such as those prevalent at ETMF is an unlawful employment practice, see Griggs v. Duke Power Co., supra, 420 F.2d at 1231, and Watkins v. Scott Paper Co., supra, 530 F.2d at 1179 n. 28—at least in the absence of a compelling "business ne-

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> No employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent standards previously in force.

The Fifth Circuit in Watkins v. Scott Paper Co., supra, 530 F.2d at 1178 n. 27, perceptively observed that:

> This guideline does not require that the affected class member show that he would have been able to qualify in the absence of discrimination; it requires only that he show that he lost the opportunity to qualify.

(emphasis in original)

cessity" for the disparity.[123/] The district court committed clear error in adopting ETMF's unequally applied standards as guidelines for its decision.

Although the Fifth Circuit did not reach the argument presented in this section, it had similar concerns in mind when it admonished the trial court to "supervise carefully the standards used by ETMF to determine whether the plaintiffs are in fact qualified" (505 F.2d at 63, App. 104). While the evidence clearly shows that ETMF did not follow the standards contained in its own manual, the record is not fully enough developed to permit determination of what, if any, standards were in fact followed. Since the district court's review of plaintiffs' qualifications was premature, further proceedings are required on remand, see part A, supra. The record may be completed at that time. At present, it suffices to conclude that the district court erred in its unquestioning acceptance of ETMF's paper criteria for road

123/ There can be no question of any such business necessity here, because ETMF has waived the standards repeatedly even during the pendency of this lawsuit. See pp. 11-12, supra, and App. 427-8, 431-3.

driver hiring. It should have concluded, as the Fifth Circuit did, that ETMF's refusal to consider plaintiffs' applications pursuant to defendants' no-transfer and seniority rules unlawfully deprived plaintiffs of employment opportunities.

CONCLUSION

For the reasons stated in this brief, this Court should affirm the judgment of the Court of Appeals for the Fifth Circuit.

DATED: October 15, 1976.

Respectfully submitted,

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